265 N.C. App.—No. 3 Pages 384-602

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 18, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY

PHIL BERGER, JR.
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
REUBEN F. YOUNG
CHRISTOPHER BROOK

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG

PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Eugene H. Soar
Michael W. Rodgers
Lauren M. Tierney
Carolina Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 21 MAY 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Error already corrected—objection to negative character evidence sustained—Defendant's argument that an officer's testimony—suggesting defendant may have been involved in gang activity—was improperly admitted was resolved when the trial court sustained his objection at trial. **State v. Thompson, 576.**

Preservation of issues—objection outside presence of jury—failure to argue plain error—Where defendant objected outside of the jury's presence to the admission of a form showing his prior felony and misdemeanor convictions but failed to object when the form was offered into evidence, the issue of the form's admissibility was not preserved for appellate review. Defendant also waived plain error review by failing to specifically and distinctly argue that the alleged error amounted to plain

Tennessee that was voluntarily dismissed without prejudice, she was not barred under res judicata principles from re-filing the same claims from her Tennessee action in a separate North Carolina lawsuit, even though Tennessee's one-year statute of limitations for filing personal injury claims had expired. The voluntary dismissal without prejudice left plaintiff in the same position as she was prior to filing the Tennessee action, so it was not a final judgment on the merits and plaintiff was free to re-file her personal injury claims in either North Carolina (within its three-year statute of limitations) or Tennessee (within its one-year statute of limitations). **Barefoot v. Rule, 401.**

CONSTITUTIONAL LAW

Confrontation Clause—unavailability—forfeiture by wrongdoing—In a prosecution for robbery-related crimes, the trial court properly admitted a recorded statement by the defendant's girlfriend where it correctly determined that the girlfriend was unavailable for purposes of the Confrontation Clause and Rule of Evidence 804. The trial court's findings of fact demonstrated that the State used reasonable means and made a good faith effort to procure the girlfriend's presence at trial, and the State satisfied its burden of showing, by a preponderance of the evidence, that defendant forfeited his confrontation rights by making threatening phone calls to his girlfriend to deter her from testifying. **State v. Allen, 480.**

Due process—attorney impairment in court—show cause order—sufficiency of notice—An attorney's due process rights were not violated where he received sufficient notice of a show cause hearing, which was initiated by the trial court pursuant to its inherent authority to regulate the conduct of practicing attorneys—after the attorney appeared in court in an impaired condition—and not pursuant to the criminal contempt statute. **In re Botros, 422.**

Motion to suppress—evidence collected under search warrant—supporting affidavit—truthfulness—Defendant was not entitled to the suppression of evidence collected from his house as part of a murder investigation where evidence supported at least some version of each statement contained in the affidavit accompanying the search warrant, and defendant failed to show the affiant acted in bad faith or in reckless disregard of the truth. **State v. Parks, 555.**

Right to remain silent—prosecutor's questions—eliciting improper testimony—Although a prosecutor elicited impermissible testimony from a detective regarding defendant's decision not to speak further during an investigative interrogation, the admission of the testimony did not amount to plain error given the substantial evidence of defendant's guilt where defendant was identified on a surveillance video as the perpetrator of a shooting. **State v. Thompson, 576.**

CRIMINAL LAW

Jury instructions—defenses—entrapment—solicitation of a minor— Defendant failed to prove he was entitled to a jury instruction on the defense of entrapment for his charge of solicitation by computer or electronic device of a person believed to be fifteen or younger for the purpose of committing an unlawful sex act and appearing at the meeting location, where the evidence supported defendant's predisposition and willingness to commit the crime. He responded to an online posting entitled "Boy Needing a Man," repeatedly stated he was looking for a "boy," and attempted to meet the online poster (an undercover officer) to engage in sexual acts after being told the poster was fifteen years old. **State v. Keller, 526.**

Permits—letter from county planning director—partially binding—A county planning director's letter positively commenting on an application for a permit to operate an asphalt plant was not, by its language and the surrounding circumstances, intended to be a determination that the permit would be issued once a state-issued air quality permit was obtained. However, the letter did bind the county to the planning director's determination that a portable shed and a barn within 1,000 feet of the proposed building site were not "commercial buildings" that would prohibit the asphalt plant from being built on the proposed site. **Ashe Cty. v. Ashe Cty. Planning Bd., 384.**

Permits—ordinance change—permit choice statute—timing of application's completion—An application for a permit to operate an asphalt plant was sufficiently complete prior to a temporary moratorium on the issuance of certain permit approvals to trigger the Permit Choice statute, N.C.G.S. § 153A-321.1. The county accepted and deposited the application fee after the application was submitted, and the remaining requirement to submit the state-issued air quality permit did not prevent the submission from triggering the Permit Choice statute. **Ashe Cty. v. Ashe Cty. Planning Bd., 384.**

Permits—permit choice statute—moratorium—new ordinance—An application for a permit to operate an asphalt plant, which was submitted before a temporary moratorium on the issuance on certain types of permits, was subject to the Permit Choice statute (N.C.G.S. § 153A-320.1) even though the county replaced the former permit ordinance with a new one when it lifted the moratorium. **Ashe Cty. v. Ashe Cty. Planning Bd., 384.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

ASHE COUNTY, NORTH CAROLINA, PETITIONER
v.
ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC, RESPONDENTS

No. COA18-253

Filed 21 May 2019

1. Zoning—permits—ordinance change—permit choice statute—timing of application's completion

An application for a permit to operate an asphalt plant was sufficiently complete prior to a temporary moratorium on the issuance of certain permit approvals to trigger the Permit Choice statute, N.C.G.S. § 153A-321.1. The county accepted and deposited the application fee after the application was submitted, and the remaining requirement to submit the state-issued air quality permit did not prevent the submission from triggering the Permit Choice statute.

2. Zoning—permits—permit choice statute—moratorium—new ordinance

An application for a permit to operate an asphalt plant, which was submitted before a temporary moratorium on the issuance on certain types of permits, was subject to the Permit Choice statute (N.C.G.S. § 153A-320.1) even though the county replaced the former permit ordinance with a new one when it lifted the moratorium.

3. Zoning—permits—letter from county planning director—partially binding

A county planning director's letter positively commenting on an application for a permit to operate an asphalt plant was not, by its language and the surrounding circumstances, intended to be a determination that the permit would be issued once a state-issued air quality permit was obtained. However, the letter did bind the county to the planning director's determination that a portable shed and a barn within 1,000 feet of the proposed building site were not "commercial buildings" that would prohibit the asphalt plant from being built on the proposed site.

4. Zoning—permits—county planning board—authority to overrule denial of application

A county planning board had the authority to overrule the county planning director's determination that a company's alleged

misrepresentations on its permit application warranted the denial of the application.

Judge BERGER concurring in separate opinion.

Appeal by Ashe County, North Carolina, from an order entered 30 November 2017 by Judge Susan E. Bray in Ashe County Superior Court. Heard in the Court of Appeals 3 October 2018.

Womble Bond Dickinson (US) LLP, by John C. Cooke, for Ashe County, North Carolina, Petitioner-Appellant.

Poyner Spruill LLP, by Chad W. Essick, Keith H. Johnson, and Colin R. McGrath, for Appalachian Materials, LLC, Respondent-Appellee.

DILLON, Judge.

Appalachian Materials, LLC ("Appalachian Materials"), filed an application for a permit to operate an asphalt plant in Ashe County (the "County"). Its permit was initially denied by the County's Planning Director. However, the County's Planning Board reversed the Planning Director's decision, directing that the permit be issued. The County appealed the decision of its Planning Board to the superior court. The superior court affirmed the decision of the Planning Board. The County appeals to this Court. We affirm.

I. Background

In June 2015, Appalachian Materials submitted an application to the County, seeking a PIDO permit[1] to operate an asphalt plant on a certain tract of land. However, Appalachian Materials noted in its application that it had applied for but not yet obtained an air quality permit *from the State*, a permit which must be obtained before the County can issue a permit for an asphalt plant in its jurisdiction.[2]

Later in June 2015, the County's Planning Director sent Appalachian Materials a letter (the "June 2015 Letter") positively commenting on the

1. A permit issued under Ashe County's then-existing Polluting Industries Development Ordinances.

2. *See S.T. Wooten v. Zebulon Bd. of Adjustment*, 210 N.C. App. 633, 635, 711 S.E.2d 158, 159 (2011) (Judge, now Chief Justice, Beasley, writing for our Court, commenting on an asphalt plant operator applicant obtaining a State-issued air quality permit as a precursor to obtaining a permit from the town).

application, but stating that Appalachian Materials needed to provide the State-issued air quality permit before any PIDO permit could be issued.

Four months later, in October 2015, Ashe County's elected Board of Commissioners (the "Governing Board") adopted a temporary moratorium on the issuance of PIDO permits (the "Moratorium").

During the Moratorium, in February 2016, Appalachian Materials finally supplemented its PIDO permit application with the State air quality permit. But two months later, in April 2016, the Planning Director issued a letter to Appalachian Materials denying the PIDO permit request. In the denial letter, the Planning Director cited the Moratorium, among other reasons, for the denial. Appalachian Materials appealed the Planning Director's denial to the Planning Board.

In the Fall of 2016, prior to the decision of the Planning Board, the County's Governing Board lifted the Moratorium, but repealed the PIDO ordinance (the "Old Ordinance") and replaced it with a new ordinance (the "New Ordinance") which created additional barriers for the approval of a permit to operate an asphalt plant.

In December 2016, the Planning Board reversed the decision of the Planning Director, determining that Appalachian Materials was entitled to the PIDO permit. The County appealed the Planning Board's decision to the superior court.

Almost a year later, in November 2017, Superior Court Judge Bray affirmed the Planning Board's order. The County has now appealed Judge Bray's order to our Court.

II. Analysis

The County's unelected Planning Board, which operates as the County's board of adjustments, voted in favor of permitting Appalachian Materials' proposed asphalt plant. *See* Ashe County Code § 153.04(J) (2015) (stating that the County's Planning Board acts as the County's board of adjustments). The County's elected Governing Board, however, is against the decision of its Planning Board, and is seeking a reinstatement of the decision made by its Planning Director, a County employee, denying the permit application. To better understand the issues on appeal, we pause briefly to describe the bases why the Planning Director denied the permit application and why the Planning Board reversed, voting to allow the permit application.

In June 2015, Appalachian Materials applied for the permit. In October 2015, the County's Governing Board adopted its temporary

Moratorium on permit approvals. By October 2016, the Moratorium had been lifted, the Old Ordinance was repealed, and the New Ordinance had gone into effect.

However, in April 2016, while the Moratorium was still in effect, the County's Planning Director denied Appalachian Materials' application for a PIDO permit, concluding that: (1) his June 2015 Letter to Appalachian Materials, in which he positively commented on the permit application shortly after the application was submitted, did not constitute a binding decision on the County that the permit would be approved once the State permit was procured; (2) the proposed site of the asphalt plant was within one thousand (1,000) feet of certain commercial buildings, in violation of the Old Ordinance's set-back requirements; (3) Appalachian Materials' permit application was not completed when the Moratorium went into effect, as the required State permit was still pending; and (4) Appalachian Materials made misrepresentations in its application.

Appalachian Materials appealed the Planning Director's denial to the County's Planning Board. The Planning Board reversed the Planning Director's conclusions and ultimate denial, itself concluding that (1) the June 2015 Letter from the Planning Director did constitute a binding determination that the permit would be approved once the State permit was procured; (2) the proposed site was *not* in violation of the Old Ordinance's one thousand (1,000) foot buffer; (3) Appalachian Materials' application was sufficiently completed when submitted, prior to the adoption of the Moratorium, to merit a decision under the Old Ordinance; and (4) the application did not contain misrepresentations which warranted denial.

For the following reasons, we conclude that Judge Bray was correct in affirming the decision of the Planning Board.

A. Appalachian Materials' Application Was Sufficiently Complete

[1] One disagreement between the parties is whether Appalachian Materials had completed its application sufficiently *prior to* the October 2015 Moratorium to trigger the statute which allows an applicant to choose which version of an ordinance to have its application considered under where the ordinance is changed before a submitted application is acted on by a county. Specifically, Section 153A-320.1 of our General Statutes, the "Permit Choice" statute, provides that "[i]f a [county's] rule or ordinance changes between the time a permit application is submitted and a permit decision is made, then G.S. 143-755 shall apply." N.C. Gen. Stat. § 153A-320.1 (2015). And Section 143-755 provides that, in such situations, "the permit applicant may choose which

version of the rule or ordinance will apply to the permit." N.C. Gen. Stat. § 143-755 (2015).

We conclude that Appalachian Materials' application had been "submitted" to the County, notwithstanding that a required State permit was still under review. The required State permit is one of many possible prerequisites which might have to be met after a sufficient application is submitted but before a permit can be finally approved. Here, the application was submitted, and the County accepted and deposited the application fee. The application was still before the County when the State permit was approved. Therefore, we conclude that the application was sufficiently "submitted," pursuant to the Permit Choice statute, in June 2015.

B. The Moratorium Does Not Nullify Permit Choice Rights

[2] A county has the right to adopt a temporary moratorium on certain permit approvals. N.C. Gen. Stat. § 153A-340(h) (2015). We conclude that the existence of a moratorium is not grounds to deny a permit. A moratorium simply delays the decision.

The County, though, argues that when a county adopts a temporary moratorium and then modifies an ordinance, the Permit Choice statute has no application. Instead, the County contends, a pending application must be reviewed under the new ordinance once the moratorium is lifted. We understand the County's policy arguments, but we are compelled to disagree.

In reaching our conclusion, we are guided in part by our Supreme Court's decision in *Robins v. Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007). In that case, Mr. Robins applied for a permit to construct an asphalt plant. *Id.* at 194, 639 S.E.2d at 422. While his application was pending, the town adopted a moratorium and then amended an ordinance which prohibited asphalt plants from operating in the town. *Id.* at 195-96, 639 S.E.2d at 423. Our Supreme Court ruled that Mr. Robins had the right to have his application considered under the version of the town ordinance in effect when his application was filed, an ordinance which *did* allow asphalt plants to operate within the town, under certain conditions:

> We hold that when the applicable rules and ordinances are not followed by a town board, the applicant is entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application. Accordingly, [Mr. Robins] was entitled to receive a

> final determination from [the town] regarding his application and to have it assessed under the ordinance in affect when the application was filed. We express no opinion [on the application's merits], but merely that [Mr. Robins] is entitled to a decision by [the town] pursuant to the ordinance as it existed before passage of the moratorium and the amendment.

Id. at 199-200, 639 S.E.2d at 425.

Seven years later, in 2014, the General Assembly essentially codified much of the Supreme Court's reasoning in *Robins* when it enacted the Permit Choice statute. Like the rule applied in *Robins*, there is no language in Section 153A-340(h), the moratorium statute, which prevents the Permit Choice statute from applying once the moratorium is lifted.

C. The June 2015 Letter Was Only Partially Binding on the County

[3] The Planning Board concluded that the June 2015 Letter, in which the Planning Director positively commented on the application, was a determination that the application would be approved once the State permit was obtained. The Planning Board further concluded that this determination by the Planning Director in his June 2015 Letter became binding on the County when the County failed to appeal the June 2015 Letter within thirty (30) days.

The County now argues that the June 2015 Letter has no binding effect.

The record shows the following: In early June 2015, Appalachian Materials submitted its application for a PIDO permit. About a week later, an Appalachian Materials representative followed up, requesting a letter from the Planning Director regarding the application:

> . . . . A letter detailing that standards of our ordinance have been met for [our] site, with the one exception [the absence of the required State air quality permit] would be great. If you could just email that to me, it would help a great deal.

That same day, the Planning Director responded by email that he would send a letter but that it would be merely his "favorable recommendation" of the application, that he still needed to see Appalachian Materials' final plans, and that he did not have the authority to provide conditional approval for the PIDO permit:

> . . . . I will write up a permit for the site *assuming the new plans meet the requirements* [*of the PIDO*].
>
> Concerning the conditional approval based on getting the [required State permit], *I cannot do that without approval from the Planning Board*. The language in the ordinance is pretty clear, "no permit from the planning department shall be issued until [all required State and Federal] permits have been issued."
>
> That said, I could write *a favorable recommendation*, or letter stating that standards of our ordinance have been met for this site, with one exception.

(Emphasis in italics added.)

A week later, the Planning Director sent the June 2015 Letter, which stated as follows:

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> The proposed site does meets (*sic*) the requirements of the Ashe County Polluting Industries Ordinance, Chapter 159 (see attached checklist). However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being issued. We have on file the general NCDENR Stormwater Permit and also the Mining Permit for this site. Once we have received the NCDENR Air Quality Permit[,] our local permit can be issued for this site.
>
> If you have any questions regarding this review please let me know.
>
> [/s/ Planning Director]

The June 2015 Letter enclosed the following checklist, which aligns with the "Permitting Standards" required to receive a PIDO permit under the Old Ordinance:

159.06A	Fee	**$500.00 Paid 6/5/2015**
	State & Federal Permits	Air Quality Permit – **applied for by applicant, local permit on hold until received**
159.06B	Buffer Requirements	1,000 feet of a residential dwelling or commercial building 1,320 feet of any school, daycare, hospital, or nursing home facility. **Verified, survey attached to permit.**
159.06B1	Permanent Roads	Permanent roads, used in excess of six months, within the property site shall be surfaced with a dust free material (soil cement, portland cement, bituminous concrete. **To be inspected prior to final inspection.**
159.06B3	Security Fence	**No extraction operation planned. Fence not required unless conditions change.**
159.06B4	Noise	**Operations shall not violate noise ordinance. Ongoing inspection required.**

Our Court has held that where a planning department official makes a decision, it may be binding on the city or county if not appealed to the board of adjustments within thirty (30) days. *See S.T. Wooten Corp. v. Bd. of Adjustment of Zebulon*, 210 N.C. App. 633, 639, 711 S.E.2d 158, 162 (2011). In determining whether a statement by a town official represents a decision binding on the County (if not appealed timely), our Court has relied upon the following factors: (1) whether the decision was made at the request of a party "with a clear interest in the outcome," such as at the request of a landowner, adjacent landowner, or builder rather than a city attorney; (2) whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a planning director; (3) whether

the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," such as "providing a formal interpretation of [a] zoning ordinance to a landowner seeking such interpretation as it related specifically to its property;" and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance." *S.T. Wooten Corp.*, 210 N.C. App. at 641-42, 711 S.E.2d at 163.

However, we have also held that "[w]here the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 153 N.C. App. 737, 743, 571 S.E.2d 588, 591 (2002). Notably, a determination that is conditioned upon a future event occurring "does not convert [the official's] unequivocal . . . interpretation into an advisory opinion." *S.T. Wooten Corp.*, 210 N.C. App. at 643, 711 S.E.2d at 164 (concluding that a planning director was bound by his prior, written determination that the local zoning ordinance would permit a proposed asphalt plant pending the issuance of a prerequisite building permit).

Here, based on the circumstances in which the June 2015 Letter was issued and the language of the prior email and the June 2015 Letter itself, we conclude that the Planning Director did not intend for his June 2015 Letter to be a determination that the permit would be issued once the State permit was obtained. But we also conclude that the June 2015 Letter did have *some* binding effect, as noted in the following section.

D. The June 2015 Letter Binds the County With Respect to the Buffer

The Old Ordinance prohibited any asphalt plant from being developed on a site within one thousand (1,000) feet of a "commercial building." Ashe County Code § 159.06(B) (2015) (repealed). The Planning Director denied the permit, in part, because the proposed site was within one thousand (1,000) feet of a portable shed, not attached to the land, used by Appalachian Materials' parent company on the same site and also within one thousand (1,000) feet of a barn on an adjacent property. The Planning Department determined that these structures were not "commercial buildings."

Our review of language in an ordinance is *de novo*; that is, we interpret language in an ordinance just like we interpret language in a statute. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155-56, 712 S.E.2d 868, 871 (2011) ("Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a

municipal ordinance."). And "[z]oning ordinances should be given a fair and reasonable construction in light of . . . the general structure of the Ordinance as a whole[,]" but, since zoning regulations are in "derogation of common law rights," they "should be resolved in favor of the free use of property." *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

Here, there is uncontradicted evidence that the barn was owned by a neighbor who ran a business in which he harvested and sold hay and that he used the barn to store his hay inventory and to store farm equipment used to harvest hay.

It may be argued that it is ambiguous whether the barn's agricultural use is a "commercial use." But it could be strongly argued that the language of the Ashe County Ordinance as a whole supports the view that the barn in question, used for an agricultural purpose which is commercial in nature (to sell farm products in the marketplace), is a "commercial" property as used in the Old Ordinance. For instance, one provision in the ordinance defines "business" as a "commercial trade . . . including but not limited to . . . agricultural . . . and other similar trades or operations." Ashe County Code § 163.05 (2015). And a planned unit development is defined as any development that includes residential and commercial uses, without any separate delineation for agricultural uses. Ashe County Code § 156.48 (2015). The ordinances dealing with permit fees to construct buildings categorize buildings as either "one and two family dwellings," "mobile homes," and "commercial," without any separate delineation for "agricultural." Ashe County Code § 150.29 (2015).

But we need not resolve whether the County's interpretation or its Planning Board's interpretation of "commercial building" as applied to the barn or the shed is correct. Rather, we conclude that the Planning Director made the determination that they were *not* commercial buildings in his June 2015 Letter and that his determination was binding on the County. Indeed, the record shows that these buildings were shown in the application and that the Planning Director stated in his June 2015 Letter that he had "verified" that these buildings were not a problem. Further, Appalachian Materials was prejudiced by this determination in that it could have sought a variance had the Planning Director not made the determination. Ashe County Code § 159.07(B) (2015) (repealed) (allowing applicant to seek a variance for any buffer issues).

We conclude that the June 2015 Letter was not a binding determination that the permit would be issued once the State permit was obtained. But we also conclude that the table in the June 2015 Letter is indicative

that the Planning Director was making a determination concerning the status of the buildings shown in the application to be in proximity of the proposed site.

It could be argued that the rule we apply creates the likelihood of "interlocutory" appeals to a board of adjustments from decisions made by planning department officials. However, we are bound by our precedent. And where a county's planning department official has made an interlocutory determination that is relied upon by an applicant, to its detriment, such determination must be appealed by the county to its board of adjustments within thirty (30) days; otherwise, the determination becomes binding. Our precedent favors a policy that citizens should not suffer when they reasonably rely upon determinations made be a county official. It is, therefore, on each county to develop a process whereby it can become aware of determinations made by its own staff so that it can preserve its right to appeal such determinations, unless and until the law in this regard is changed.

E. Misrepresentations in the Application

[4] The Planning Director denied the application based on other factors such as his view that Appalachian Materials made misrepresentations on its application. The Planning Board reviewed these alleged misrepresentations and determined that they were not sufficient to warrant the denial of the application. We note that, under the Ashe County Code, the Planning Board has the authority to "uphold, modif[y], or overrule[] in part or in its entirety" any determination made by the Planning Director. Ashe County Code § 153.04(f) (2015). Here, the Planning Board has made its determination; and we cannot say that the Planning Board has exceeded its authority to overrule the determination made by the Planning Director.

IV. Conclusion

The Moratorium is no longer in effect. Appalachian Materials' application must be reviewed under the Old Ordinance, as requested by Appalachian Materials. The Planning Director bound the County on the issue of whether certain buildings were each a "commercial building" as defined in the buffer provision in the Old Ordinance. The Planning Board had the authority to determine whether the application otherwise complied with the Old Ordinance. We, therefore, affirm the trial court's order affirming the decision made by the Planning Board.

AFFIRMED.

Judge STROUD concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority that the Polluting Industries Development Ordinance permit ("PIDO" or "PIDO permit") should be released to Appalachian Materials, LLC. However, because the County did not timely appeal to the Planning Board, neither the Planning Board nor the trial court had the requisite subject matter jurisdiction to review the appeal. Therefore, the trial court's order should be vacated, this matter dismissed, and the permit released to Appalachian Materials.

In June 2015, Appalachian Materials submitted an application to Adam Stumb ("Stumb"), Ashe County's Planning Director, for a permit to be issued, as required under the local PIDO. This permit would authorize Appalachian Materials to operate portable asphalt equipment on a portion of its leased property in Ashe County, North Carolina. Appalachian Materials' application included the required $500.00 application fee and a copy of its air quality permit application, which Appalachian Materials contemporaneously submitted to the North Carolina Department of Environmental Quality ("NCDEQ"). As this air quality permit was required for a PIDO permit to be issued, Appalachian Materials further promised that it would forward a copy of the air quality permit to Stumb upon receipt from NCDEQ.

Shortly after Appalachian Materials submitted its PIDO permit application, Stumb agreed to provide written confirmation as to whether Appalachian Materials' permit complied with PIDO, notwithstanding the pending air quality permit determination. Stumb's decision "was important for Appalachian [Materials] to know in order to continue to spend time, money and resources in connection with securing" another necessary permit. In response to Appalachian Materials' request, Stumb visited Appalachian Materials' property, "created and reviewed certain GIS maps and photographs that identified all buildings in close proximity to the [p]roperty and created certain GIS shape files identifying any buildings that required buffering or setbacks from the proposed polluting industry under [PIDO]."

On June 22, 2015, Stumb sent Appalachian Materials the following letter (the "June 2015 Letter"):

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> *The proposed site does meets* (*sic*) *the requirements of the Ashe County Polluting Industries Ordinance*, Chapter 159 (see attached checklist). However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being issued. We have on file the general [NCDEQ] Stormwater Permit and also the Mining Permit for this site. Once we have received the [NCDEQ] Air Quality Permit[,] our local permit can be issued for this site.
>
> If you have any questions regarding this review please let me know.
>
> [Stumb's Signature]
> Adam Stumb
> Director of Planning

(emphasis added). Appalachian Materials "continued to invest time, money[,] and resources into the proposed asphalt facility" after receiving the June 2015 Letter.

On February 26, 2016, NCDEQ issued the outstanding air quality permit to Appalachian Materials. On February 29, 2016, Appalachian Materials forwarded a copy of its air quality permit to Stumb and requested that he issue its PIDO permit as promised. That same day, Stumb responded via email that he may need additional information from Appalachian Materials or NCDEQ before considering the request to issue the PIDO permit. After a series of communications between Stumb and Appalachian Materials, Stumb wrote a letter to Appalachian Materials on April 20, 2016 (the "April 2016 Letter"), which denied its request to issue a PIDO permit. In the April 2016 Letter, Stumb contended that "the proposed polluting industry was located with 1,000 feet of a residential dwelling unit or commercial building, in violation of [PIDO], that the [a]pplication was incomplete because Appalachian [Materials] had not obtained all necessary state and federal permits, and that Appalachian [Materials] made several false statements in the [a]pplication."

On May 16, 2016, Appalachian Materials appealed Stumb's April 2016 Letter to the Planning Board. The Planning Board held a quasi-judicial hearing on October 6, 2016, in which Appalachian Materials argued that Stumb's June 2015 Letter was a binding determination that the County did not timely appeal. Therefore, Appalachian Materials argued that Stumb had no authority to subsequently reverse this binding decision by denying Appalachian Materials' application for a PIDO permit in the April 2016 Letter. On December 1, 2016, the Planning Board entered an order (the "Planning Board's Order"), in which the Planning Board unanimously reversed the April 2016 Letter; concluded that Appalachian Materials had satisfied all the requirements of PIDO; classified the June 2015 Letter as a binding and final determination; and found "no basis for any other allegation made by Stumb in his April 2016 Letter that any material misrepresentation was made in the [a]pplication," and ordered Stumb to release the PIDO permit to Appalachian Materials.

The County appealed from the Planning Board's Order by filing a petition for writ of certiorari with in Ashe County Superior Court on December 30, 2016. On November 30, 2017, the superior court entered an order (the "Superior Court's Order"), affirming the Planning Board's Order in all respects and ordering the County to issue a PIDO permit to Appalachian Material within ten business days.

On December 7, 2017, the County filed a motion with the superior court to stay its order. However, the County did not calendar the motion, therefore no stay has been entered. Moreover, the County failed to comply with the Superior Court's Order because it transferred custody of Appalachian Materials' PIDO permit to the superior court rather than issuing the PIDO permit directly to Appalachian Materials.

The County timely appealed the Superior Court's Order to this Court, arguing, *inter alia*, that the superior court erred by concluding that the June 2015 Letter was a final, binding determination. Because the June 2015 Letter was a final determination that the County did not timely appeal to the Planning Board, the Planning Board and superior court lacked the requisite subject matter jurisdiction to review this matter. Accordingly, the trial court's order should be vacated and the PIDO permit should be released to Appalachian Materials.

It is well settled in North Carolina that

> *boards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed.* The extent to which a board of adjustment has jurisdiction

> to hear an appeal is a question of law. In the event that a board of adjustment decision is alleged to rest on an error of law such as an absence of jurisdiction, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined.

Meier v. City of Charlotte, 206 N.C. App. 471, 476, 698 S.E.2d 704, 708 (2010) (citations omitted) (emphasis added). "Upon further appeal to this Court from a superior court's review of a municipal board of adjustment's decision, the scope of our review is the same as that of the trial court." *S.T. Wooten Corp. v. Bd. of Adjustment of Zebulon*, 210 N.C. App. 633, 637-38, 711 S.E.2d 158, 161 (2011) (*purgandum*).

Section 153.04(J) of the Ashe County Code of Ordinances states:

> The Planning Board shall act as the Board of Adjustment for all land usage ordinances in the Ashe County Code of Ordinances (Title XV: Land Usage). The Board shall act and hold hearings in accordance with G.S. § 153A-345.1 entitled Planning Boards. Each hearing shall follow rules applied to quasi-judicial proceedings. Each decision shall be based upon competent, material, and substantial evidence noted in the record of the proceeding.

Ashe County Code § 153.04(J) (2019).

Section 153A-345.1(a) of the North Carolina General Statutes dictates that "[t]he provisions of G.S. 160A-388 are applicable to the counties." N.C. Gen. Stat. § 153A-345.1(a) (2017). In relevant part, Section 160A-388 states:

> (a1) *Provisions of Ordinance.* – The zoning or unified development ordinance may provide that the board of adjustment hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance. As used in this section, the term "decision" includes any final and binding order, requirement, or determination. The board of adjustment shall follow quasi-judicial procedures when deciding appeals and requests for variances and special and conditional use permits. The board shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development.

N.C. Gen. Stat. § 160A-388(a1) (2017).

Aligning with Section 160A-388(b1), Section 153.04(J)(3) of the Ashe County Code states, in relevant part:

> The Planning Board shall hear and decide appeals from decisions of Planning Department officials charged with enforcement of the development ordinances and may hear appeals arising out of any other ordinance that regulates land use, subject to all of the following:
>
> (a) Any person who is directly affected may appeal a decision to the Planning Board. An appeal is taken by filing a notice of appeal with the clerk to the Board. The notice of appeal shall state the grounds for appeal.
>
> (b) A county administrative official who has made a decision from which someone wishes to appeal shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first class mail.
>
> (c) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

Ashe County Code § 153.04(J)(3).

Simply stated, to appeal a decision made by an Ashe County Planning Department official, a petitioner must (1) have standing and (2) file the appeal within 30 days after receiving actual or constructive notice of the official's binding decision. "Our case law has made clear that for this thirty-day [notice of appeal] clock to be triggered, the order, decision, or determination of the administrative official must have some binding force or effect for there to be a right to appeal . . . ." *S.T. Wooten Corp.* 210 N.C. App. at 639, 711 S.E.2d at 162 (citation and quotation marks omitted). "Where the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 743, 571 S.E.2d 588, 591 (2002). Notably, a determination that is conditioned upon a future event occurring "does not convert [the official's] unequivocal . . . interpretation into an advisory opinion." *S.T. Wooten Corp.*, 210 N.C. App. at 643, 711 S.E.2d at 164 (concluding that a planning director

was bound by his prior, written determination that the local zoning ordinance would permit a proposed asphalt plant pending the issuance of a prerequisite building permit).

When assessing whether a letter from an administrative official represents the official's binding and appealable decision, this Court has previously relied upon the following factors: (1) whether the decision was made at the request of a party "with a clear interest in the outcome," such as at the request of a landowner, adjacent landowner, or builder rather than a city attorney; (2) whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a Planning Director; (3) whether the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," such as "providing a formal interpretation of the zoning ordinance to a landowner seeking such interpretation as it related specifically to its property"; and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance." *Id.* at 641-42, 711 S.E.2d at 163.

Here, the parties do not dispute standing, and it is uncontested that the County did not timely appeal Stumb's June 2015 letter. Rather, the crux of this appeal is whether Stumb's June 2015 Letter served as a final determination binding the County to issue Appalachian Materials a PIDO permit.

Applying the above-mentioned factors, it is clear that (1) Stumb issued the June 2015 Letter to Appalachian Materials who, as the lessee of the disputed property and owner of the proposed asphalt plant, had a "clear interest" in whether Stumb concluded that its permit application complied with PIDO; (2) Stumb, as Ashe County's Planning Director, had the authority to issue PIDO permits and determine whether Appalachian Materials' permit application complied with PIDO; (3) the June 2015 Letter reflected Stumb's formal and definitive interpretation that Appalachian Materials' permit application complied with PIDO; and (4) Appalachian Materials relied on Stumb's June 2015 Letter as a binding decision that its application had been approved and that the PIDO permit would be issued once the air quality permit was obtained. Accordingly, the June 2015 Letter represented a binding determination that was subject to appeal to the Planning Board per N.C. Gen. Stat. § 160A-388(a1) and Ashe County Code § 153.04(J)(3).

Therefore, the County was required to voice any objection to the June 2015 Letter by noticing appeal within the requisite 30-day

period per N.C. Gen. Stat. § 160A-388(b1)(3) and Ashe County Code § 153.04(J)(3)(c). Because the County did not timely appeal from the June 2015 Letter, both the Planning Board and the superior court lacked subject matter jurisdiction to reconsider whether Appalachian Materials' application complied with PIDO. *See Meier*, 206 N.C. App. at 476, 698 S.E.2d at 708 ("[B]oards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed."). Absent a timely appeal, the June 2015 Letter bound the County to release the PIDO permit to Appalachian Materials once a copy of the outstanding air quality permit was forwarded to Stumb on February 29, 2016.

Because neither the Planning Board nor the trial court had subject matter jurisdiction, the order should be vacated, this matter dismissed, and the PIDO permit released to Appalachian Materials.

SHEENA BAREFOOT, PLAINTIFF
v.
JACQUELYN PATRICIA RULE, DEFENDANT

No. COA18-1160

Filed 21 May 2019

Collateral Estoppel and Res Judicata—voluntary dismissal without prejudice—same claims re-filed in another state—no res judicata effect

Where plaintiff filed a personal injury action in Tennessee that was voluntarily dismissed without prejudice, she was not barred under res judicata principles from re-filing the same claims from her Tennessee action in a separate North Carolina lawsuit, even though Tennessee's one-year statute of limitations for filing personal injury claims had expired. The voluntary dismissal without prejudice left plaintiff in the same position as she was prior to filing the Tennessee action, so it was not a final judgment on the merits and plaintiff was free to re-file her personal injury claims in either North Carolina (within its three-year statute of limitations) or Tennessee (within its one-year statute of limitations).

Appeal by plaintiff from order entered 13 August 2018 by Judge Marvin P. Pope, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 10 April 2019.

Crumley Roberts, LLP, by David J. Ventura, for plaintiff-appellant.

McAngus Goudelock & Courie, by Zephyr Jost Sullivan, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals an order granting defendant's motion for judgment on the pleadings based upon res judicata. Because we conclude that plaintiff's voluntary dismissal without prejudice of her prior lawsuit in Tennessee under Tennessee Rule 41 had no res judicata effect, we reverse and remand for further proceedings consistent with this opinion.

I. Background

On 28 June 2016,[1] plaintiff filed a personal injury action in Tennessee against defendant, alleging that defendant's negligence caused her injuries arising out of an automobile accident. The collision between the parties' vehicles was on 3 July 2015 in North Carolina, but both parties were residents of Tennessee. In Tennessee, the statute of limitations for a personal injury claim is one year. *See* Tenn. Code Ann. § 28-3-104(a)(1)(A) (Supp. 2016). On 7 November 2016, plaintiff filed a "Nonsuit without Prejudice" noticing voluntary dismissal without prejudice citing "T.R.C.P. 41.01" which is similar to North Carolina General Statute § 1A-1, 41(a)(1) (2015). *Compare T*enn. R. Civ. P. 41.01; N.C. Gen. Stat. § 1A-1, Rule 41 (2015). Both the Tennessee Rule of Civil Procedure Rule 41.01 and North Carolina's Rule of Civil Procedure 41 allow voluntary dismissal by a plaintiff without prejudice. Tenn. R. Civ. P. 41.01; N.C. Gen. Stat. § 1A-1, Rule 41. Further, both states extend the statute of limitations to refile a claim for one year from the date of the voluntary dismissal without prejudice, if the statute of limitations would have otherwise expired. *See* Tenn. Code Ann. § 28-1-105(a) (2000); N.C. Gen. Stat. § 1A-1, Rule 41. On 16 November 2016, the Tennessee trial court entered an order dismissing plaintiff's action without prejudice, noting it was the first dismissal.

On 5 April 2018, plaintiff filed a complaint seeking recovery for personal injuries arising from the same automobile accident in North Carolina, alleging essentially the same tort claims as she had in Tennessee. The statute of limitations for a personal injury claim in North Carolina is

1. The file stamp is barely legible but defendant notes 28 June 2016 as the date of the complaint, and our record confirms that an answer to that complaint was filed by August of 2016.

three years, *see* N.C. Gen. Stat. § 1-52(16) (2015); so the North Carolina case was filed within North Carolina's statute of limitations, *see id.*, but Tennessee's one year statute of limitations and the one-year extension would have expired. *See* Tenn. Code. §§ 28-1-105(a); -3-104(a)(1)(A).

In June of 2018, defendant answered plaintiff's complaint, denying the material factual allegations and alleging several affirmative defenses, including res judicata. Defendant alleged:

> Plaintiff filed a nearly identical action in the Circuit Court of Davidson County, Tennessee. A copy of the pleadings for this action is attached hereto as Exhibits A-F. On November 7, 2016, Plaintiff filed Exhibit F, Non-Suit without Prejudice. Tennessee has a one year statute of limitations for negligence claims. Plaintiff had one year to re-file her action after taking the voluntary dismissal, during which the statute of limitation was tolled. Plaintiff failed to re-file her action within the time allowed.

Defendant later filed a motion for judgment on the pleadings based upon the res judicata defense. On 13 August 2018, the trial court granted defendant's motion: "[T]he Court hereby finds that the Plaintiff's claims are barred by the doctrine of res judicata. Accordingly, Defendant's Motion for Judgment on the Pleadings i[s] hereby GRANTED." Plaintiff appeals.

II. Voluntary Dismissal without Prejudice

Plaintiff contends that the trial court erred in granting defendant's motion for judgment on the pleadings.

A. Standard of Review

We review the trial court's ruling on this issue *de novo:*

> A trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal. In determining whether to grant a motion for judgment on the pleadings,
>
> > the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and

> matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.
>
> A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. For that reason, the motion's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit, with a motion for judgment on the pleadings being the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. We will now utilize this standard of review to determine whether the trial court correctly granted Defendant's motion.

Samost v. Duke Univ., 226 N.C. App. 514, 517–18, 742 S.E.2d 257, 259–60, *aff'd per curiam*, 367 N.C. 185, 751 S.E.2d 611 (2013) (citations, quotation marks, ellipses, brackets, and footnotes omitted).

B. Res Judicata

Defendant argued to the trial court, and the trial court agreed, that plaintiff's claim should be dismissed based upon res judicata.

> Res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. A judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. . . .
>
> . . . In order to successfully assert the doctrine of res judicata, a litigant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.

Moody v. Able Outdoor, Inc., 169 N.C. App. 80, 84, 609 S.E.2d 259, 261–62 (2005) (citations and quotation marks omitted).

Plaintiff contends that res judicata is not relevant because "[t]his Appeal involves the fundamental question of whether North Carolina's Three Year Statute of Limitations or Tennessee's One Year Statute of Limitations governs the instate action[.]" Defendant contends,

> Notably, the statute of limitations for negligence claims in Tennessee is one year. Tenn. Code Ann. §28-3-104(a)(1)(A). Since the car accident at issue occurred on 3 July 2015, Plaintiff would have initially had to file her negligence claim in Tennessee on or before 3 July 2016. However, because the statute of limitations for Plaintiff's claim was tolled for one year after the dismissal order was entered, she had until 16 November 2017 to re-file her claim. Plaintiff failed to re-file in Tennessee within that time period and instead filed the instant action on 5 April 2018. Plaintiff's claim was barred in Tennessee when she failed to re-file on or before 17 November 2017 because the tolling of the statute of limitations lapsed. As such, the Tennessee court's dismissal, filed on 16 November 2016, became a final judgment on the merits for purposes of res judicata.

Plaintiff presumes, without citing legal authority, that North Carolina automatically steps in to apply its laws instead of Tennessee's law upon re-filing her claim in North Carolina, and defendant presumes, also without citing legal authority, that once plaintiff filed her suit in Tennessee she would thereafter be bound by Tennessee law on this claim even though she voluntarily dismissed that suit without prejudice and re-filed in North Carolina. Neither brief directly addresses the question at the core of this appeal – whether taking a voluntary dismissal without prejudice in one state requires the law of that state, here specifically the statute of limitations, to control, even if the same claim is later filed in a different state, which has a longer statute of limitations. Essentially, this is a question of how a voluntary dismissal without prejudice operates between states.

Tennessee's case law interprets a Rule 41.01 voluntary dismissal without prejudice to place the parties in the same position they were in prior to filing the suit: "When a voluntary nonsuit is taken, the rights of the parties are not adjudicated, and the parties are placed in their original positions prior to the filing of the suit." *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn. 2012). In *Cooper v. Glasser*, the plaintiff had sued in California state court and voluntarily dismissed his case without prejudice. 419 S.W.3d 924, 925 (Tenn. 2013). The plaintiff re-filed the action

in a federal court in Tennessee; thereafter, the plaintiff dismissed that action and re-filed in Tennessee state court. *Id.* Unlike North Carolina, Tennessee allows for two voluntary dismissals without prejudice. *See* N.C. Gen. Stat. § 1A-1, Rule 41; Tenn. R. Civ. P. 41.01. The case was appealed to Tennessee's Supreme Court on the issue of whether federal or state law should control on claim preclusion, and notably, as applicable to this case, Tennessee's Supreme Court stated,

> Tennessee Rule of Civil Procedure 41.01(1) permits a plaintiff to voluntarily dismiss his case two times without prejudice. Moreover, this Court has previously recognized that a voluntary dismissal places the parties in their original positions prior to the filing of the suit. We are therefore convinced that Tennessee law does not give claim-preclusive effect to Mr. Cooper's second voluntary dismissal in federal court.

Cooper, 419 S.W.3d at 927-30 (citation and quotation marks omitted). Thus, the Tennessee Supreme Court explained that a voluntary dismissal without prejudice functions to "place the parties in their original positions" and thereby allows them to switch between state and federal courts. *See id.*

North Carolina's Rule 41 operates in the same manner since the dismissal puts the plaintiff in the same position "as if the suit had never been filed[.]" *Hous. Auth. of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) (citation, quotation marks, and brackets omitted).

> It is well settled that a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case. The effect of a judgment of voluntary dismissal is to leave the plaintiff exactly where he or she was before the action was commenced. After a plaintiff takes a Rule 41(a) dismissal, there is nothing the defendant can do to fan the ashes of that action into life, and the court has no role to play. As a result of the fact that, once a party voluntarily dismisses its action pursuant to N.C. Gen. Stat. § 1A–1, Rule 41(a)(1) (1990), it is as if the suit had never been filed.

Id. (citations, quotation marks, ellipses, and brackets omitted).

Under either Tennessee or North Carolina law, a Rule 41.01 or 41 voluntary dismissal without prejudice leaves the plaintiff "exactly where

he or she was before the action was commenced." *Id.* Before this action was commenced, plaintiff was free to file a lawsuit in either North Carolina or Tennessee. Plaintiff had three years to file in North Carolina and only one year to file in Tennessee. *See* N.C. Gen. Stat. § 1-52(16); Tenn. Code Ann. § 28-3-104(a)(1)(A). The Tennessee Court's order of voluntary dismissal placed no restrictions upon plaintiff upon re-filing her claim.[2] We conclude plaintiff was free to re-file her claim in North Carolina as an entirely new claim, as if she had never filed the first suit, since the dismissal order in Tennessee operated to leave her in the same position as she was prior to filing the lawsuit. Defendant's argument that the Rule 41.01 dismissal without prejudice operated as a final judgment on the merits in an earlier suit and that plaintiff's claim is barred by res judicata is not supported by either Tennessee or North Carolina law. Nor is Tennessee's statute of limitations substituted for North Carolina's based upon the voluntary dismissal order. We reverse the order of the trial court and remand for further proceedings. We express no opinion on the merits of plaintiff's claim or other defenses raised by defendant other than res judicata, the issue on appeal.

III. Conclusion

We conclude the trial court erred in granting defendant's motion for judgment on the pleadings based on res judicata. We reverse and remand.

REVERSED and REMANDED.

Judges BRYANT and COLLINS concur.

---

2. We do not suggest that the Tennessee court would have had any authority to enter an order of voluntary dismissal without prejudice with any additional conditions upon plaintiff's re-filing, but even if this was possible, the order here did not include any conditions. *See generally Bechuck v. Home Depot U.S.A., Inc.*, 814 F.3d 287, 289 (5th Cir. 2016).

HILLS MACH. CO., LLC v. PEA CREEK MINE, LLC

[265 N.C. App. 408 (2019)]

HILLS MACHINERY COMPANY, LLC, Plaintiff
v.
PEA CREEK MINE, LLC, JOC FARMS, LLC, and
JOSEPH D. BRILEY, JR., Defendants
v.
JOC FARMS, LLC and PEA CREEK MINE, LLC, Counterclaim and
Third-Party Plaintiffs
v.
HILLS MACHINERY COMPANY, LLC, Counterclaim Defendant, and
CNH INDUSTRIAL AMERICA, LLC d/b/a CASE IH, Third-Party Defendant

No. COA18-890

Filed 21 May 2019

1. Warranties—manufacturer warranty—breach of express warranty—summary judgment

In an action concerning a defective wheel loader, the trial court properly granted summary judgment in favor of the loader manufacturer on the purchaser's breach of warranty claim because, based on undisputed evidence and the warranty's plain language, no genuine issue of material fact existed as to when the warranty period expired or whether the manufacturer received notice of the defect within the warranty period. Additionally, even assuming the manufacturer did receive notice of the defect during the warranty period, neither the notice itself nor the manufacturer's failure to cure the defect within the warranty period— the latter of which could have tolled the statute of limitations for bringing a breach of warranty claim—automatically extended the warranty period.

2. Fraud—accompanying claim for unfair and deceptive trade practices—fraudulent intent—mere nonperformance or broken promise

Where plaintiff purchased a defective wheel loader and the manufacturer promised to fix the defect but failed to do so, the trial court properly granted summary judgment in favor of the manufacturer on plaintiff's claims for fraud and unfair and deceptive trade practices, because plaintiff failed to forecast any evidence that the manufacturer lacked the intent to fulfill its promise at the time it made that promise.

Appeal by JOC Farms, LLC from order entered 1 May 2018 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 26 March 2019.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for third-party plaintiff-appellant JOC Farms, LLC.

Womble Bond Dickinson (US) LLP, by Jamie A. Dean and Ryan H. Niland, for third-party defendant-appellee CNH Industrial America, LLC.

TYSON, Judge.

JOC Farms, LLC ("JOC") appeals from the trial court's order, which granted CNH Industrial America, LLC, d/b/a Case IH ("Case") summary judgment on JOC's claims for breach of warranty, fraud, and unfair and deceptive trade practices. We affirm the trial court's order.

I. Background

JOC purchased a 2006 model 921C loader (the "Loader") manufactured by Case from Briggs Construction Equipment, Inc. ("Briggs") on or about 30 April 2009. Briggs had previously purchased the Loader from Case on 29 August 2008. Case had issued a manufacturer's warranty (the "Case Warranty") for the Loader. The Case Warranty states, in relevant part:

> **What's Covered**
>
> *If a defect in material or workmanship is found in a unit and reported during the Warranty Period*, Case will pay parts and labor costs to repair the defect, if the services are performed by an authorized Case dealer at the dealer's location. [Emphasis supplied].

The warranty period stated in the Case Warranty began "at the time that any person, dealer or agent first places the unit into service" and ended "when either the month or machine hour limit is reached, whichever limit occurs first." The warranty period for the Loader's engine lasted 24 months or until the engine reached 2,000 machine hours, whichever occurred first. The warranty period for components, other than the engine, was one year after the date the Loader was placed into service.

The Case Warranty also states, in relevant part:

> **No Modification or Extension of Warranty**
>
> The Case Warranty is limited to the written terms in this pamphlet. Case *does not authorize any person, dealer*

> *or agent to change or extend* the terms of this warranty in any manner. *Any assistance to the purchaser in the repair or operation of any Case product outside the terms or limitations or exclusions of this warranty will not constitute a waiver of the terms, limitations or exclusions of this warranty, nor will such assistance extend or re-establish the warranty.* [Emphasis supplied].

The Case Warranty included the following disclaimer:

> **THIS DOCUMENT CONTAINS THE ENTIRE CASE WARRANTY. CASE MAKES NO OTHER REPRESENTATIONS OR WARRANTIES EXPRESSED OR IMPLIED AND SPECIFICALLY EXCLUDES THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE.** [Emphasis in original]

When Appellant purchased the Loader from Briggs, the Loader had already accrued 887 machine hours. Before completing the purchase, Appellant's owner Joseph Briley, Jr. ("Briley) took the Loader for a test drive. During the test drive, Briley mentioned to Briggs' salesman that the Loader exhibited a significant vibration. Briley did not think the vibration was significant enough to preclude his purchase.

When purchasing the Loader, JOC also purchased a 3-year/3,000 hour extended warranty plan, referred to as a "Purchased Protection Plan," ("PPP") through Briggs' dealership. The PPP was issued by EPG Insurance, Inc. ("EPG"). According to the affidavit of Mark T. Heman ("Heman"), a product support manager for Case, "PPPs are sold through the dealer and are generally designed to cover defects that arise after the manufacturer's warranty has expired[,]" and "[Case] is not a party to any PPP issued by EPG."

After JOC's purchase of the Loader, JOC and a sister company named Pea Creek Mine, LLC ("Pea Creek") began using the Loader for industrial tasks, including extracting sand, loading, and hauling lime and fertilizer. Pea Creek was also owned by JOC's owner, Briley. Over a five year period after purchase, JOC and Pea Creek amassed more than 7,000 machine hours on the Loader.

The first time JOC took the Loader to Briggs for servicing was on 8 June 2009. JOC reported that the Loader's battery would not hold a charge and the cables were not working. A warranty claim was submitted to Case, who paid the claim under the Case Warranty.

The next time JOC brought the Loader to Briggs for repairs was September 2010. The reported issue was a problem with the Loader's fuel coil. A warranty claim was not submitted to Case for this problem. Instead a claim was submitted to EPG by Briggs under the PPP. EPG paid the covered portion of this claim. At the time JOC brought the loader to Briggs for repair in September 2010, the Loader had accrued 2,508 hours.

In February 2011, JOC brought the Loader to East Carolina Equipment Company for repairs related to a bearing in the transmission which was causing "vibration in power train while traveling." A claim was submitted to EPG for the repairs and EPG paid the covered portion under the PPP.

In April 2011, Case received a warranty claim relating to the Loader's transmission. In October 2011, Case received another warranty claim relating to the Loader's instrumentation. The Case Warranty had long expired by accrued hours and passage of time when both of these claims were filed. According to Heman's affidavit, for the April 2011 claim, Case paid $6,625.00 to JOC for a rental loader. For the October 2011 claim, Case paid $1,146.29 towards the repair costs. According to Heman, Case made these payments as gestures of goodwill to maintain clients and as "assistance to the purchaser in the repair or operation of any Case product outside the terms or limitations or exclusions of [the] warranty."

Sometime in 2011 or 2012, JOC contacted Case to request further financial assistance with an alleged vibration problem with the Loader. Case's product support manager, Jeffrey Schoch, met with JOC's representatives to discuss the issue. According to JOC's owner, Briley, Schoch told him that Case "would stand behind their product." JOC and Pea Creek continued to use the Loader.

On 20 February 2012, JOC filed a voluntary petition for bankruptcy protection under Bankruptcy Code Chapter 11 in the United States Bankruptcy Court for the Eastern District of North Carolina. *See* 11 U.S.C. § 301. On 26 February 2013, the Bankruptcy Court approved JOC's proposed plan of reorganization. JOC did not list any potential legal claims against Case as an asset in its bankruptcy filings.

Sometime in September 2013, JOC brought the Loader to Hills Machinery Company, LLC ("Hills") for repairs. In May 2015, Hills filed suit against JOC, Pea Creek, and Briley, allegedly for the failure to pay a balance due of $34,708 allegedly owed for repairs to the Loader. JOC responded by filing counterclaims against Hills and asserting third-party claims against Case on 4 August 2015. JOC alleged that problems with

the Loader were related to a vibration it asserted Case had undertaken to repair during the warranty period, but had failed to do. JOC asserted claims for breach of warranty, fraud, and unfair and deceptive trade practices against Case.

On 23 October 2017, Case filed a motion for summary judgment on JOC's claims pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure. On 26 October 2017, Pea Creek and JOC gave notice of five depositions to Hills and Case. Hills filed a motion for a protective order to reschedule the deposition of one of its witnesses due to a medical condition. Case filed an emergency motion for a protective order to prevent Pea Creek and JOC from proceeding with the depositions. The trial court heard Case's and Hills's motions for protective order, and ordered JOC to postpone one of the noticed depositions. The parties consented to JOC and Pea Creek proceeding with the other four depositions.

Following the completion of depositions by JOC and Pea Creek, Case filed a renewed motion for summary judgment. The trial court heard Case's summary judgment motion and granted summary judgment to Case on all of JOC's claims. JOC filed timely notice of appeal. JOC and Case are the only parties participating in this appeal.

II. Jurisdiction

The trial court certified its interlocutory order, which granted summary judgment to Case on all of JOC's claims, as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017).

III. Standard of Review

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); see N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where

> matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). "Our standard of review of an appeal from summary judgment is *de novo*[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations omitted).

IV. Analysis

A. *Breach of Warranty*

[1] JOC argues genuine issues of material fact exist "regarding when JOC notified Case of the defects and whether Case's failures to repair the defects it was notified about during the shortest of the manufacturer's warranty periods asserted (one year) tolls the statute of limitations (and thereby extends the warranty until the repairs are made)" to support its breach of warranty claim.

In response, Case contends it "has not relied on a statute of limitations defense, and JOC's arguments concerning tolling of the statute of limitations are misplaced."

JOC argues conduct by a warrantor which would toll the statute of limitations for a breach of warranty claim also extends the warranty period. JOC also implies that a warrantor receiving notice of a purported defect also extends the warranty period.

JOC cites two cases in support of its argument: *Haywood Street Redevelopment Corp. v. Peterson, Co.*, 120 N.C. App. 832, 463 S.E.2d 564 (1995), and *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 267 S.E.2d 919 (1980).

In *Haywood*, this Court held a three-year statute of limitations for a breach of warranty claim was tolled during the time the defendant attempted to repair a waterproofing treatment it had applied to the plaintiff's parking deck to bring it into conformity with the warranty during the warranty period. 120 N.C. App. at 838, 463 S.E.2d at 567. This Court stated: "A statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty." *Id.* (citations omitted).

In *Stutts*, the plaintiff sought repairs on his Ford truck purchased from the dealership. 47 N.C. App. at 509, 267 S.E.2d at 923. Ford Motor Company and the dealership had jointly warranted "(a)ny part [found to be defective in factory material or workmanship] during the first 12 months or 12,000 miles of operation, whichever is earliest (except tire and diesel engines manufactured by others than Ford . . .)." *Id.* at 512, 267 S.E.2d at 924 (brackets in original). The plaintiff returned the truck to the dealership to repair an oil leak during the warranty period. *Id.*

After the dealership repeatedly fail to fix the oil leak, the plaintiff took the truck to another Ford dealership. *Id.* at 513, 267 S.E.2d at 925. At the end of the warranty period, the truck continued to leak oil despite several attempts by the selling Ford dealership and the other Ford dealership to fix the leak. *Id.*

The plaintiff filed claims, in part, against the dealership from which he had bought the truck and against Ford, the manufacturer, for breach of warranty. *Id.* at 507, 267 S.E.2d at 922. The dealership and Ford filed motions for directed verdicts, which the trial court granted. *Id.* at 507-08, 267 S.E.2d at 922. On appeal, the plaintiff argued the trial court erred in granting the defendants' motions for directed verdicts. *Id.* In response, the defendants argued:

> [The dealership] contends that plaintiff has failed to meet his burden of showing that [the dealership] failed to repair and replace parts found to be defective as required by the warranty and, further, that plaintiff's refusal to permit [defendant] to perform any further work on the truck after 26 October 1976 relieved it of any liability under the warranty. Likewise, defendant Ford Motor Company contends that its warranty obligation was satisfied when either [the selling dealership] or [the other dealership] replaced defective parts called to their attention.

Id. at 511, 267 S.E.2d at 924.

This Court stated:

> Although limited warranties are valid, compliance with their covenants to repair and to replace defective parts requires that the warrantor do more than make good faith attempts to repair defects when requested to do so. A manufacturer or other warrantor may be liable for breach of warranty when it repeatedly fails within a reasonable time to correct a defect as promised. A party seeking to recover for breach of a limited warranty is not required to give the warrantor unlimited opportunities to attempt to bring the item into compliance with the warranty.

Id. at 511-12, 267 S.E.2d at 924.

This Court rejected the dealership and Ford's arguments, reasoning:

> [T]here is sufficient evidence presented in the record from which the jury could infer that [the dealership] either refused to perform further repairs on plaintiff's truck, or that it failed to make proper repair of defective parts on the truck within a reasonable time, thereby causing plaintiff to seek repairs from another Ford dealer. In either event, both defendants' liability for breach would attach, and the plaintiff's refusal to return the vehicle to the selling dealer for further repairs would not preclude him from recovery.

Id. at 513, 267 S.E.2d at 925.

This Court reversed the trial court's grant of the defendants' motions for directed verdicts and remanded for a new trial. *Id.* at 514, 267 S.E.2d at 925.

Stutts and *Haywood* do not address the rule for which JOC purports to cite them. Neither case held that conduct by a warrantor, which may toll the statute of limitations on a breach of warranty claim, also extends the warranty period. *See id.*; *Haywood*, 120 N.C. App. at 838, 463 S.E.2d at 567. Neither of these cases hold that a warrantor's notice of a defect extends the warranty period until the defect is repaired. After extensive review of the case law, we have found no cases which stand for the proposition JOC attempts to assert.

Presuming, *arguendo*, attempts by a warrantor to correct a defect or notice of a defect during the term of the warranty extends the warranty period, the evidence, viewed in the light most favorable to JOC, does not

establish a genuine issue of material fact with respect to its breach of warranty claim.

The Case Warranty is a written express warranty. " 'An express warranty is an element in a sale contract and is contractual in nature.' " *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 343, 623 S.E.2d 334, 338 (2006) (quoting *Perfecting Serv. Co. v. Product Development & Sales, Co.*, 261 N.C. 660, 668, 136 S.E.2d 56,62 (1964)). As a contract being interpreted, the terms of an express warranty "are therefore construed in accordance with their plain meaning," *Coates v. Niblock Dev. Corp.*, 161 N.C. App. 515, 517, 558 S.E.2d 492, 494 (2003) (citations omitted).

The Case Warranty expressly states that the warranty period for the Loader began "at the time that any person, dealer or agent first places the unit into service" and ended "when either the month or machine hour limit is reached, whichever limit occurs first." Service records for the Loader indisputably show it was placed into service beginning on 29 August 2008. Briley, the owner of JOC, acknowledged in his deposition he knew the Loader had been used by a company in Florida prior to JOC's purchase.

The plain language of the Case Warranty indicates the applicable warranty period for the Loader's engine lasted 24 months after the Loader was placed into service or until the engine reached 2,000 machine hours, whichever occurred first. The warranty period for components, other than the engine, was one year from the date the Loader was placed into service. Under its plain and unambiguous terms, the *latest* time the Case Warranty would cover any defects would have been 29 August 2010, or 24 months after the Loader was placed into service.

The Case Warranty plainly states that a repair is covered "[i]f a defect in material or workmanship is found in a unit and reported during the Warranty Period[.]"

Between 30 April 2009, when Briley purchased the Loader on JOC's behalf, and 29 August 2010, the latest time the Case Warranty was in force and valid, the Loader was never brought to Briggs nor any other Case dealer for repairs related to the vibration that JOC's claim is premised upon. The undisputed evidence presented by the parties shows the only claim submitted during the longest period the Case Warranty could have covered was for repairs to the Loader's battery and cables in June 2009. Case paid for the costs for this claim, which JOC does not dispute. Case's records from June 2009 do not mention any vibration in the Loader. JOC has produced no evidence tending to indicate the problems

with the battery and cables in June 2009 were related to or caused by the vibration issue.

JOC also contends it gave Case notice of the alleged vibration defect when Briley test drove the Loader with Briggs's sales representative, Billy Tedder, in April 2009. Briley test drove the Loader prior to purchase. Briley testified in his deposition he noticed a vibration in the Loader when he test drove it, but "[a]t the time [he] didn't think it was a problem." Briley mentioned to Tedder that the Loader "had a vibration in it." Briley further testified:

> [Briley]: Well, I – I figured a new model machine, didn't know it was a problem. But I did make Billy aware of it as we were driving it. Not, you know – not in the sense that – basically curious, asked Billy, it seems to have a shake compared to the other loaders we've had before, a vibration.
>
> Q. Did you do anything else to make sure the [L]oader worked before you bought it other than this test drive?
>
> [Briley]: No.
>
> Q. When you told Billy that the [L]oader seemed to have a vibration problem during the test drive, what did Billy say?
>
> [Briley]: Basically he stated that it had the remaining warranty on it and that if we want to purchase extended warranty through them, that it would cover it if there's an issue with it. But as far as he's concerned, he – really wasn't familiar with the bigger loaders, that he thought maybe all of them had that type of vibration in them.

Later in his deposition, Briley was asked, "Does JOC claim that [Case] knew the [L]oader was defective before it was sold?" Briley responded: "No. I can't say that. But they knew immediately afterwards it did."

JOC has produced no evidence showing what notice Case had of the vibration problem in between the time Briley purchased the Loader and the latest time the Case Warranty could have expired in August 2010. Briley admitted he did not think the vibration was a problem when he test drove the Loader and no evidence shows JOC brought the Loader to Briggs, nor any other authorized Case dealer, to investigate or repair the vibration during the Case Warranty period. JOC contends the comments Briley made during the pre-purchase test drive put Case on notice of the

alleged defect, but Briley admitted in his own testimony that Case did not know the Loader was defective before it was sold.

Briley signed and acknowledged the terms of the Case Warranty when he purchased the Loader on JOC's behalf. Briley testified he understood "that in order to be covered by the manufacturer's [Case] warranty, a defect would have to be reported within the warranty period."

Based upon the plain language of the Case Warranty, the documentary exhibits, and Briley's deposition testimony, JOC is unable to establish a genuine issue of material fact exists with respect to its breach of warranty claim. JOC did not provide Case the notice of the alleged vibration defect during the warranty period, as is required by the express terms of the Case Warranty. JOC's argument is overruled.

B. *Fraud and Unfair and Deceptive Trade Practices*

[2] JOC also argues genuine issues of material fact exist with regards to its fraud and unfair and deceptive trade practices claims against Case. We disagree.

Unfair and deceptive trade practice ("UDTP") claims are governed by N.C. Gen. Stat. § 75-1.1. *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 87-88, 747 S.E.2d 220, 226 (2013). Under the statute, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2017).

To prevail upon a UDTP claim, a plaintiff must establish the following elements: " '(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.' "*Capital Res.*, *LLC v. Chelda*, *Inc.*, 223 N.C. App. 227, 239, 735 S.E.2d 203, 212 (2012) (citation omitted) (alteration in original), *review dismissed*, *cert. denied*, __ N.C. __, 736 S.E.2d 191 (2013).

"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "To prove deception, while 'it is not necessary . . . to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, [a] plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Capital Res.*, 223 N.C. App. at 239, 735 S.E.2d at 212 (citation omitted) (alterations in original).

"Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which plaintiff complains." *Tucker v. Blvd. At Piper Glen, LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (citation and quotation marks omitted).

With respect to a fraud claim, a plaintiff must establish the following elements:

> (1) that the defendant made a representation of a material past or present fact; (2) that the representation was false; (3) that it was made by the defendant with knowledge that it was false or made recklessly without regard to its truth; (4) that the defendant intended that the plaintiff rely on the representation; (5) that the plaintiff did reasonably rely on it; and (6) injury.

Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 87, 334 S.E.2d 404, 407 (1985) (citing *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980)).

"[A] mere promissory representation will not support an action for fraud." *Id.* "However, a promissory misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and with no intent to comply with the stated promise or representation." *Id.* (citations omitted).

In support of its UDTP and fraud arguments, JOC asserts: "Case acknowledged repeatedly by word and deed that the Loader had yet to be repaired to address JOC's very first vibration complaints while at the same time telling Mr. Briley to go ahead and run the Loader. JOC, Pea Creek and Mr. Briley relied on those words and deeds to their detriment."

In its complaint, JOC alleges UDTP and fraud against Case based upon "fraudulent misrepresentations." Briley testified that "roughly three years after JOC purchased the Loader," he met with Jeffrey Schoch, a product support manager with Case, to discuss the vibration issue with the Loader. If the meeting occurred three years after JOC had purchased the Loader, it would have occurred outside the maximum time period the Case Warranty could have covered any defects. Briley testified that, at this meeting, Schoch told him Case "stand[s] behind their product and they were going to have [the Loader] fixed."

Case concedes in its brief that "for the purposes of summary judgment, Case does not dispute that the statement was made." Briley acknowledged JOC was not relying on any statements other than "we stand behind our product to support its fraud claim[.]"

Viewed in the light most favorable to JOC, no evidence establishes a genuine issue of fact with respect to JOC's fraud claim. Even if Schoch's statements that Case "stands behind their product and they were going to have it fixed" is construed as a promise that Case would fix the Loader, this is a promise of future performance. The Supreme Court of North Carolina has long recognized: "It is generally held, and is the law in this State, that mere unfulfilled promises cannot be made the basis for an action of fraud." *Williams v. Williams*, 220 N.C. 806, 810, 18 S.E.2d 364, 366 (1942). "Mere proof of nonperformance is not sufficient to establish the necessary fraudulent intent." *Id.* at 811, 18 S.E.2d at 367. This Court has stated: "The general rule is that an unfulfilled promise cannot be the basis for an action for fraud unless the promise is made with no intention to carry it out." *Northwestern Bank v. Rash*, 74 N.C. App. 101, 105, 327 S.E.2d 302, 305 (1985) (citation omitted).

JOC failed to forecast any evidence to show Case lacked the intent to fix the Loader at the time Schoch made the statement in question in 2011. Case submitted the affidavit of one of its product support managers, Heman, in support of its motion for summary judgment. Included as an exhibit to Heman's affidavit, is a copy of Case's "internal database called ASIST [which is used] to track any repairs for which a dealer requests assistance." The ASIST records show instances from 2013 and 2014 where Case employees provided advice to Hills's mechanics on how to fix the Loader's front axle and differential.

To the extent JOC purportedly argues Schoch's representations in 2011 somehow renewed or extended the Case Warranty, such a situation is expressly disclaimed by the Case Warranty, which states:

> Case does not authorize any person, dealer or agent to change or extend the terms of this warranty in any manner. Any assistance to the purchaser in the repair or operation of any Case product outside the terms or limitations or exclusions of this warranty will not constitute a waiver of the terms, limitations or exclusions of this warranty, nor will such assistance extend or re-establish the warranty.

Upon review of the evidence in the record, no genuine issue of material fact exists with respect to JOC's fraud claim against Case. *See Supplee v. Miller-Motte Bus. C., Inc.*, 239 N.C. App. 208, 229, 768 S.E.2d

582, 598 (2015) (affirming trial court's grant of summary judgment where plaintiff "failed to present specific evidence that . . . defendants had no intention of carrying out its unfulfilled promise; an essential element for a successful fraud claim.").

With respect to JOC's UDTP claim, the evidence of Schoch's statement that Case "stands behind its product," and promised to fix the vibration in the Loader, when viewed most favorably to JOC, shows, at most, a broken promise. A broken promise, standing alone, is not enough to establish a UDTP claim, unless the evidence shows the promisor "intended to break its promise at the time that it made the promise." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 196, 767 S.E.2d 374, 378 (2014); *see Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 451-52, 279 S.E.2d 1, 6 (1981).

In *Overstreet*, the defendant promised to the plaintiff that no part of a subdivision would be used for non-residential purposes. *Overstreet*, 52 N.C. App. at 451-52, 279 S.E.2d at 6. A year later, the defendant sold a subdivision lot to a buyer who it knew would use the lot for non-residential purposes. *Id.* On review of the trial court's grant of a motion for directed verdict to the defendant, this Court held that no evidence indicated that the defendant intended to break its promise at the time defendant made the promise and plaintiff had failed to establish a UDTP claim. *Id.* at 452-53, 279 S.E.2d at 6-7.

JOC has produced no evidence to indicate Case did not intend to fix the Loader at the time Schoch made the unauthorized representation to Briley in 2011. *Wells Fargo*, 238 N.C. App. at 196-97, 767 S.E.2d at 378. Schoch's representation is contrary to the express terms of the "No Modification or Extension of Warranty" provision in the Case Warranty, which prohibits "any person, dealer or agent to change or extend the terms of [the] warranty in any manner." The ASIST system records show Case continued to provide information and advice to Hills's mechanics on how to repair the Loader after Briley had met with Schoch in 2011. No genuine issue of material fact exists to support JOC's UDTP claim. JOC's arguments are overruled.

C. *Judicial Estoppel*

Case argues the equitable defense of judicial estoppel as an alternative and independent basis to support summary judgment. Case argued the equitable defense of judicial estoppel as one of the bases for its motion for summary judgment before the trial court. Based upon our holding to affirm the trial court's order on the grounds that there are no genuine issues of material fact with respect to any of JOC's

claims, it is unnecessary and we decline to address Case's judicial estoppel argument.

V. Conclusion

Viewed in the light most favorable to JOC, no genuine issues of material fact exist with respect to JOC's claims for breach of warranty, fraud, and UDTP. The trial court correctly ruled Case was entitled to summary judgment as a matter of law. *See Summey*, 357 N.C. at 496, 586 S.E.2d at 249; *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. The trial court's order, which granted summary judgment to Case, is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and HAMPSON concur.

IN THE MATTER OF TONY SAMI BOTROS, ATTORNEY

No. COA18-1137

Filed 21 May 2019

1. Attorneys—impairment—disability inactive status—court order—findings of fact—sufficiency of evidence

A trial court's findings of fact in its order transferring an attorney to disability inactive status (for appearing in court in an impaired condition) were supported by sufficient competent evidence.

2. Jurisdiction—trial court—attorney regulation—transfer to disability inactive status—inherent authority

The trial court had jurisdiction to enter an order transferring an attorney to disability inactive status pursuant to state courts' inherent authority to regulate the conduct of practicing attorneys. Since the court's show cause order did not arise out of a criminal contempt proceeding, Chapter 5A of the General Statutes did not apply.

3. Constitutional Law—due process—attorney impairment in court—show cause order—sufficiency of notice

An attorney's due process rights were not violated where he received sufficient notice of a show cause hearing, which was initiated by the trial court pursuant to its inherent authority to regulate the conduct of practicing attorneys—after the attorney appeared in

court in an impaired condition—and not pursuant to the criminal contempt statute.

4. Attorneys—impairment—disability inactive status—order—conclusions of law

The trial court did not abuse its discretion by placing an attorney on disability inactive status for appearing in court in an impaired condition, where its conclusions of law were supported by findings which were in turn supported by competent evidence. Six witnesses testified that they believed the attorney was impaired on two separate occasions in court, and the attorney failed to produce evidence of a medical opinion at his show cause hearing that supported his competency to practice law.

Appeal by Respondent from Order entered 8 June 2018 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 28 February 2019.

North Carolina State Bar, by A. Root Edmonson, Deputy Counsel, for plaintiff-appellee.

Tony S. Botros, respondent-appellant, pro se.

HAMPSON, Judge.

Factual and Procedural Background

Tony Sami Botros (Respondent) appeals from an Order (Disability Order) transferring him to "disability inactive status."[1] The evidence presented at Respondent's hearing tends to show the following:

At all relevant times, Respondent, who was admitted to the North Carolina Bar in 2013, was engaged in the practice of law and maintained an office in Wake County. In March of 2018, Respondent was representing the plaintiff in a tort case before Wake County Superior Court, and the defendant had filed a motion for summary judgment with the court, which was scheduled to be heard the week of 26 March 2018. On 26 March 2018, Superior Court Coordinator, Lisa Tucker, notified Respondent that

1. The North Carolina State Bar Rules define "disability inactive status" as a class of membership in the North Carolina State Bar that "includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney, as determined by the courts, the council, or the Disciplinary Hearing Commission." 27 N.C. Admin. Code 1A.0201(c)(2)(C) (2018).

the summary judgment motion would be heard at 12:00 p.m. on 29 March 2018 in courtroom 10-B of the Wake County Courthouse, with Superior Court Judge A. Graham Shirley (Judge Shirley) presiding.

On the morning of 29 March 2018, Respondent also had an unrelated custody hearing before Wake County District Court Judge Ashleigh P. Dunston (Judge Dunston) in courtroom 2-A of the Wake County Courthouse. Respondent appeared in Judge Dunston's courtroom at approximately 9:40 a.m. When Respondent's opposing counsel sought to call a six-year-old girl to testify, Judge Dunston called both Respondent and opposing counsel into chambers and suggested the parties attempt to mediate a resolution. While in chambers, Judge Dunston began to suspect Respondent might be impaired based on his slurred speech, dilated eyes, and incoherent arguments.

As noon approached, Respondent and opposing counsel had not reached an agreement regarding their clients' custody dispute. As a result, Respondent failed to appear in Judge Shirley's courtroom for the hearing on the summary judgment motion. Around this time, the clerk from Judge Dunston's courtroom called the clerk in Judge Shirley's courtroom to notify Judge Shirley of Respondent's whereabouts and that Respondent was unsure which court, superior or district court, had priority. Upon being notified of Respondent's dilemma, Judge Shirley went to Judge Dunston's courtroom to discuss the matter.

When Judge Shirley arrived in Judge Dunston's courtroom, Judge Dunston informed Judge Shirley of her suspicions regarding Respondent's potential impairment. During their discussions, the two judges decided Judge Shirley had priority and ordered Respondent to report to Judge Shirley's courtroom to address the summary judgment motion. Thereafter, Judge Shirley left Judge Dunston's chambers and rode the elevator back to his courtroom with Respondent.

Upon arriving in Judge Shirley's courtroom, Respondent appeared distressed and requested five minutes to "collect himself," which Judge Shirley allowed. While Respondent was away, Judge Shirley requested Lisa Tucker and Kellie Myers, who was the Trial Court Administrator in Wake County, accompany him in chambers, as Lisa Tucker had encountered Respondent on a previous occasion and could gauge whether Respondent's behavior was consistent with her previous interaction with him. When Respondent returned to the courtroom, Judge Shirley requested both Respondent and opposing counsel join him in chambers.

Once in chambers, "[i]t became readily apparent to [Judge Shirley] that [Respondent] was impaired" because his pupils were dilated, his

speech was slurred, and he did not have "a rational thought process." When asked by Judge Shirley if he was on any medication or other mind-altering substances, Respondent admitted he took antidepressants, as he suffered from an anxiety disorder and depression, but adamantly denied he was impaired. Based on Respondent's condition, Judge Shirley informed Respondent that he believed Respondent was impaired and unable to represent his client, and that he intended to continue the hearing to the following week. Respondent insisted Judge Shirley allow him to state on the record he was not impaired and was ready to proceed with the hearing. However, Judge Shirley refused Respondent's calls to go on the record in order to save Respondent from publicly damaging his reputation with his client. Thereafter, Respondent was allowed to leave, and the summary judgment hearing was continued until 6 April 2018.

Upon leaving Judge Shirley's chambers, Respondent returned to Judge Dunston's courtroom. Judge Dunston informed Respondent that she would not allow him to proceed with the custody hearing and asked Respondent if he would submit to an examination by a drug recognition expert (DRE). Respondent initially agreed to the DRE examination. However, when the DRE arrived, Respondent stated he was embarrassed and wanted to leave, and refused to submit to the DRE examination. Thereafter, Respondent left.

On 6 April 2018, Respondent returned to Judge Shirley's courtroom for the hearing on the summary judgment motion. Respondent arrived at the hearing late, and after approximately two-thirds of his argument, Respondent stopped and asked Judge Shirley if he could pause to have a drink of water, which Judge Shirley allowed. Thereafter, Respondent informed Judge Shirley that he was not on his "A-game" and requested the court continue the matter, which Judge Shirley denied. At the conclusion of the hearing, Judge Shirley took the matter under advisement and requested Respondent accompany him back to chambers.

Once in chambers, Judge Shirley expressed his concerns regarding Respondent's behavior on 29 March 2018, which he believed amounted to contempt of court. Judge Shirley also informed Respondent that he believed Respondent was impaired on 6 April 2018 as well. Based on these concerns, Judge Shirley presented Respondent with a draft Motion to Show Cause for Contempt and told Respondent he would not file this Motion if Respondent would voluntarily seek evaluation and treatment through the Lawyer Assistance Program (LAP). As a further condition, Judge Shirley required Respondent sign a release allowing the LAP to report Respondent's compliance status to Judge Shirley. Thereafter,

Respondent agreed to Judge Shirley's request and signed the release (LAP Agreement).

At 4:37 a.m. on 2 May 2018, Respondent sent an email to Kellie Myers revoking the LAP Agreement and declaring it "null and void," contending he was initially coerced into signing the LAP Agreement. Respondent also sent an email to the Eastern Clinical Coordinator of the LAP revoking the LAP Agreement.

After learning of Respondent's revocation of the LAP Agreement, Judge Shirley filed an Order to Show Cause (Show Cause Order), which was served on Respondent on 15 May 2018. The Show Cause Order stated, in pertinent part:

> YOU ARE HEREBY GIVEN NOTICE THAT . . . a hearing will be held . . . to determine whether this Court shall impose professional discipline or transfer your law license to disability inactive status as a result of your recent conduct within the Tenth Judicial District.
>
> The Court initiates this action on its own motion, pursuant to its inherent authority to regulate the conduct of officers of the court. The information before the Court (as more specifically set forth herein) raises the question of whether you have violated the North Carolina Rules of Professional Conduct, or in the alternative, whether you are presently suffering from a mental or physical condition (which may include but is not limited to mental illness and/or substance abuse) which significantly impairs your professional judgment, performance, or competency as an attorney.

On 1 June 2018, a hearing on the Show Cause Order came on before Wake County Senior Resident Superior Court Judge Paul C. Ridgeway (Judge Ridgeway). Respondent attended this hearing and represented himself *pro se*. At the end of the day, Judge Ridgeway adjourned the hearing and notified Respondent that the hearing would resume on 6 June 2018. However, Respondent failed to appear on 6 June 2018 when the hearing resumed. At the conclusion of the 6 June 2018 hearing, Judge Ridgeway took the matter under advisement, and on 8 June 2018, Judge Ridgeway entered the Disability Order transferring Respondent to disability inactive status. On 9 July 2018, Respondent timely filed Notice of Appeal from the Disability Order.

Issues

Respondent raises several arguments on appeal, and these arguments distill into the following issues: (I) whether the trial court's Findings of Fact are supported by competent evidence; (II) whether the trial court had subject matter jurisdiction to place Respondent on disability inactive status; (III) whether Respondent was afforded the requisite due process, including proper notice of the proceedings; and (IV) whether the trial court's Findings and Conclusions supported placing Respondent on disability inactive status.

Standard of Review

Respondent challenges numerous Findings of Fact and Conclusions of Law in the trial court's Disability Order. When reviewing an order of a trial court entered pursuant to its inherent authority to regulate officers of the court, "[f]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (alteration in original) (citations and quotation marks omitted). Because acts of the trial court under its inherent authority are discretionary in nature, when reviewing the trial court's conclusions of law, "we need determine only whether they are the result of a reasoned decision[.]" *Id.* at 180, 695 S.E.2d at 435 (citation omitted); *see also In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) ("The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion." (citation omitted)). By way of example, "[w]hen discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted).

Analysis

I. Findings of Fact

[1] Respondent argues there is insufficient evidence to support 12 of the trial court's Findings. We disagree.

Respondent first challenges Finding 4, which states:

> [Respondent] failed to appear at the appointed time on March 29, 2018 in Courtroom 10-B presided over by Judge A. Graham Shirley ("Judge Shirley"). The Courtroom Clerk in Courtroom 10-B received a call from the Courtroom

> Clerk in Courtroom 2-A and indicated that [Respondent] was in that Courtroom and was attempting to determine which court had priority despite previously being told that he was expected in Courtroom 10-B at 12:00 p.m. Judge Shirley went to Courtroom 2-A to discuss this matter with the presiding District Court Judge Ashleigh P. Dunston ("Judge Dunston").

In his brief, Respondent contends this Finding is unsupported because Judge Shirley testified he came down to Judge Dunston's courtroom before 12:00 p.m. However, competent evidence was presented at the hearing showing Respondent did not appear in Judge Shirley's courtroom at the appointed time, 12:00 p.m. At the 1 June 2018 hearing, Judge Shirley testified "[a]t 12 o'clock, [Respondent] had not shown up." Further, Judge Shirley's courtroom clerk testified Respondent was not in Judge Shirley's courtroom by 12:00 p.m. on 29 March 2018. Therefore, this Finding is supported by competent evidence.

Respondent next challenges Findings 5 and 6, which state:

> 5. In the course of their conversation in Courtroom 2-A, Judge Dunston informed Judge Shirley that she was of the opinion that [Respondent] was impaired. She recounted that while [Respondent] was in or around Courtroom 2-A, Judge Dunston observed that [Respondent] spoke in a rambling and sometimes ranting fashion, had slurred speech and dilated eyes, and that she believed him to be under the influence of an impairing substance.
>
> 6. The Courtroom Clerk in Courtroom 2-A also formed the opinion that [Respondent] was impaired. She observed that [Respondent] initially appeared lethargic, and that he spoke with slurred speech, was sweaty, and that he frequently wiped his face and tugged at his collar. This same Clerk also encountered [Respondent] outside of the courthouse during the lunch hour, and [Respondent] was walking down stairs in a very unsteady manner and needed to steady himself on the hand rails.

Respondent contends these Findings are not supported by competent evidence because (1) Judge Dunston testified several times that she was unsure if Respondent was impaired and (2) the Courtroom Clerk in 2-A, Christina Sollers, testified she could not tell whether Respondent's eyes were dilated.

First, Respondent mischaracterizes Judge Dunston's testimony. Although Judge Dunston did testify that on 29 March 2018 she initially "did not know for sure" whether Respondent was impaired, her testimony throughout the 1 June 2018 hearing consistently shows she believed Respondent was impaired that day. Judge Dunston testified, "I definitely thought something was wrong [with Respondent]. His eyes did appear dilated; they – you know, his words were slurred; he was rambling about things that had nothing to do with what we were talking about[.]" Judge Dunston also notified Judge Shirley of her suspicions regarding Respondent's impairment, and Judge Dunston also testified she thought "[Respondent] was impaired on some type of pill or something."

As for Finding 6, although Christina Sollers stated she could not tell whether Respondent's eyes were dilated, she consistently testified Respondent seemed impaired on 29 March 2018. Sollers averred Respondent seemed impaired because "he seemed a little lethargic . . . . He was very sporadic. He came to court late. He slurred his words. He tugged on his collar a lot; wiped his face a lot." In addition, Sollers testified Respondent seemed sweaty and she observed Respondent needing to steady himself as he walked down a flight of stairs at the courthouse. Therefore, competent evidence supports the trial court's Findings 5 and 6.

In addition, Respondent asserts Finding 7 is not supported by competent evidence, which Finding states: "After speaking with Judge Dunston and upon leaving Chambers for Courtroom 2-A, Judge Shirley witnessed [Respondent] speaking with a Deputy of the Wake County Sheriff's Office. Based upon [Respondent's] speech he continued to appear impaired and disoriented." Respondent contends because the Deputy did not testify, this Finding is unsupported. However, Finding 7 relates to Judge Shirley's impressions of Respondent during his conversation with the Deputy, which Judge Shirley was competent to testify about because he personally witnessed the conversation. *Cf. Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 886 (1960) ("A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge." (citations omitted)). Therefore, the fact that the Deputy did not testify is inconsequential to Finding 7.

Respondent next challenges Finding of Fact 9, which provides: "Immediately upon appearing before Judge Shirley, [Respondent] requested five minutes to 'collect' himself. [Respondent] appeared somewhat distressed and disoriented." Respondent argues this Finding is unsupported by competent evidence because on cross-examination

Respondent played a recording of the 29 March 2018 hearing showing Respondent requested to "have one -- one moment[,]" without saying it was to "collect" himself. However, the trial court's Finding that Respondent's request for a moment was to "collect" himself is a reasonable inference from Judge Shirley's testimony. *See Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 358, 734 S.E.2d 125, 128 (2012) ("While plaintiff may not have used the precise words of the findings in his testimony, the findings reasonably paraphrase plaintiff's testimony or *are inferences reasonably drawn from that testimony*." (emphasis added)). In any event, this Finding is not necessary to the trial court's Conclusions of Law; therefore, Respondent's argument on this Finding is without merit. *See In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) ("Immaterial findings of fact are to be disregarded. . . . It is sufficient if enough *material* facts are found to support the judgment." (citations omitted)).

Respondent also contends Finding of Fact 10 is not supported by the evidence, which Finding states:

> When [Respondent] returned, Judge Shirley met with counsel in Chambers. [Respondent's] pupils were dilated, his speech was slurred, and he did not appear to be able to speak in a coherent manner. [Respondent] stated that he was taking antidepressant medication and had been diagnosed with depression and social anxiety disorder.

Respondent asserts this Finding is unsupported because three of the State's witnesses testified they could not tell whether Respondent's pupils were dilated. However, Judge Shirley testified "[Respondent's] pupils were dilated." Further, Judge Dunston also testified Respondent's "eyes did appear dilated[.]" This constitutes competent evidence supporting Finding 10.

Respondent next challenges Finding of Fact 12, which reads:

> The Courtroom Clerk in Judge Shirley's courtroom[, Caitlyn Beale,] also formed the opinion that [Respondent] was impaired on March 29, 2018. She noted that he was jumpy, erratic, sweating, not able to express coherent thoughts and that his eyes were dilated. This same clerk had seen [Respondent] on March 26, 2018 at calendar call, and his appearance and actions on March 29, 2018 were markedly different from his more normal demeanor on March 26, 2018.

Respondent argues this Finding is unsupported because Caitlyn Beale "testified she was unsure of whether Respondent was impaired, stated she could not tell if Respondent's eyes were dilated when he first presented, and stated that Respondent's matter was never argued and thus could make no judgment of whether Respondent was able to express coherent thoughts." However, the following testimony by Caitlyn Beale supports Finding 12:

> Q. And did you observe [Respondent] while he was in the courtroom [on 29 March 2018]?
>
> A. I did.
>
> Q. Did he appear to you to be effective for his client?
>
> A. No.
>
> Q. What -- what did you witness that made you think he was ineffective?
>
> A. His behavior was very erratic. He seemed a little jumpy and he was kind of sweaty or clammy and just not able to put a coherent thought together.
>
> Q. Did -- did he -- did his eyes appear to be dilated?
>
> A. When he first came out, he was not close enough to see him [sic], so I can't really say for sure. But later, after we took a brief recess, he did come up to my desk and they did appear to be dilated.
>
> Q. Did -- did he -- and did he appear to you to be impaired by maybe a substance he was taking?
>
> A. I mean I can't say for sure, but he was not his normal self. I had seen him at calendar call that Monday and that was not his behavior on Monday.
>
> Q. And was he able to articulate an argument on behalf of his client?
>
> A. We never even heard his matter, so no.
>
> Q. So he -- why did you not hear his matter?
>
> A. Judge Shirley pulled him in chambers and asked if he was okay to proceed hearing the matter and I believe Judge Shirley didn't feel comfortable proceeding to hear

> it anyway, and so we decided to continue it to the following week.

Respondent next challenges Finding 13, which provides:

> After leaving Courtroom 10-[B] on March 29, 2018 [Respondent] returned to Courtroom 2-A. There, Judge Dunston informed him that based upon her observations and Judge Shirley's observations, she was not going to allow [Respondent] to proceed. [Respondent] told Judge Dunston that he was not taking anything other than prescribed medications and that he was not "high." Judge Dunston asked whether he would submit to an examination by a Drug Recognition Expert (DRE) and [Respondent] answered he would. However, when the DRE arrived, [Respondent] stated that he did not want to submit to an examination and just wanted to leave.

Respondent contends this Finding is not supported by the evidence because Judge Dunston testified she was unsure if Respondent was impaired and admitted she released Respondent prior to a DRE arriving. However, the following testimony regarding what Judge Dunston told Respondent upon returning to her courtroom supports this Finding:

> So [Respondent and opposing counsel] came up and approached the bench. And I basically told [Respondent] as nicely as I could that based upon what I believed as far as him being impaired, also the fact of what I had learned from Judge Shirley and also that [Judge] Shirley had already determined that he was not what I believed competent to proceed that day, which is why he continued the case, that at that point I said, okay, well, I don't -- I also don't believe -- if a superior court judge has done this, I -- I definitely can't have you practice in my court immediately after that. And I don't think that you should. And I had some questions this morning, but now I'm confirmed in that.
>
> And he basically told me that he had a social disorder, social -- some -- some type of disorder, that he was taking medication for that, that he's not on anything other than his prescribed medication. He -- he said that he was not -- that he was not high.
>
> . . . .

> And I asked him at the bench, I said, will you submit to a drug recognition expert? I have one coming and if, you know, they determine that there's nothing wrong, I mean then that's -- then it is what it is.
>
> And he told me he would. He said, yes, I will because I'm not -- there's nothing wrong with me, blah, blah, blah. And I said, Okay.
>
> . . . .
>
> [After approximately 20 minutes,] DRE had arrived. And so when the DRE got there, [Respondent] did not submit to his testing and said that he just wanted to leave and that he was embarrassed and that he was not going to submit to the DRE. And then that was the last time I saw him when he walked out of the courtroom.

Although Respondent contends Judge Dunston's testimony contradicted the above exchange (without citing where in the transcript this occurred), we hold the above exchange supports Finding 13. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434 ("[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, *even if . . . there is evidence to the contrary*." (alterations in original) (emphasis added) (citation and quotation marks omitted)).

Respondent next challenges Finding of Fact 17, which states:

> In Chambers, Judge Shirley advised [Respondent] that Judge Shirley was concerned with his conduct on March 29, 2018 and that his conduct on April 6, 2018 did nothing to alleviate those concerns. Judge Shirley informed [Respondent] that the Court believed that his conduct on March 29, 2018 amounted to Contempt of Court and a violation of the Rules of Professional Conduct and that the Court had prepared a Motion to Show Cause, which he showed to [Respondent]. Judge Shirley further informed [Respondent] that first and foremost he was concerned for [Respondent's] well-being. Judge Shirley explained that he was prepared to issue and file the Motion to Show Cause but would hold off on signing any order if [Respondent] would voluntarily present himself to the Lawyer's Assistance Program (LAP) for an evaluation and follow any recommended treatment. As a further condition of not proceeding with the Motion to Show Cause,

> Judge Shirley indicated that he would only defer entering the Motion to Show Cause if [Respondent] executed a release that would allow LAP to provide the following information to the Court: (a) whether [Respondent] made contact with LAP; (b) the status of [Respondent's] participation with LAP, including whether or not he was compliant with the clinical recommendations of the LAP; (c) a copy of any LAP Recovery Contract entered into by [Respondent]; and (d) the status of [Respondent's] LAP Recovery Contract.

Respondent asserts this Finding is not supported because the "release" was never introduced or admitted into evidence. However, Judge Shirley had personal knowledge of the release and was competent to testify to its contents. *Cf. Robbins*, 251 N.C. at 666, 111 S.E.2d at 886 (citations omitted). Regarding the release, Judge Shirley testified as follows:

> So [Respondent] came back into chambers. I had him take a seat. And I told [Respondent], I said, [Respondent], I said, I am very concerned about what happened in my court in 10B last week. And to be honest, your conduct -- and again, I reiterated, I told him I believed he was impaired -- your conduct to me amount to contempt of court. And as a judge, that is something that I could not let pass and I was going to have to do something about it.
>
> I told him that my primary concern was his well-being and the well-being of his clients. And I showed him an order I had prepared on a Motion to Show Cause. At that point in time it's a Motion to Show Cause why he shouldn't be held in contempt of court and/or why he shouldn't be disciplined or have his -- be placed on an inactive status because of either a substance abuse problem or mental health problem. And I told him I was prepared to enter that order that day, but what I would do is I would defer entering that order on the -- on the following conditions: That he voluntarily present himself to LAP. And I disclosed what that was; that he get an evaluation. That if after the evaluation they recommended any treatment, that he'd follow that treatment protocol and whatever contract he had with LAP; and finally that -- so I could ensure that he was in compliance with whatever LAP was asking him to do, I asked him -- I told him he'd be -- have to sign a consent form. And that if he did those things, I would -- and told him what the consent form was for. And -- and told

> him that if he did those things, I would not file and make a public record.
>
> . . . .
>
> I -- I would not make a public. That, you know, you wouldn't have a public record with the -- the Motion to -- to Show Cause.
>
> He readily agreed. In fact, his reaction was almost one of relief. He signed the consent order -- or he signed the consent allowing me to monitor him. I told -- I gave him, I believe, until 5 o'clock on Monday to -- to make telephonic communication with LAP. I then informed the folks from LAP they should be expecting a call.

This testimony constitutes competent evidence to support Finding 17.

Respondent next challenges Findings 19 and 20, which state as follows:

> 19. [Respondent] indicated that he wanted to voluntarily present himself to LAP and he thereafter executed the release.
>
> 20. As a result of the April 6, 2018 hearing, the Court ultimately granted the Defendant's Motion for Summary Judgment. In addition to the Court concluding that the evidence did not show intentional or reckless conduct, [Respondent] failed to present any evidence in the form required by Rule 56(e) of the North Carolina Rules of Civil Procedure concerning any severe emotional distress suffered by Plaintiff. In defense of this lack of evidence [Respondent] complained to the Court that his client's deposition had not even been taken.

Respondent asserts these two Findings are not supported by competent evidence because the execution of the release was not voluntary. We first note Finding 20 is immaterial to the trial court's Conclusions of Law; therefore, we do not address this Finding. *See In re Custody of Stancil*, 10 N.C. App. at 549, 179 S.E.2d at 847 ("Immaterial findings of fact are to be disregarded." (citation omitted)).

As for Respondent's contention that the execution of the release was not voluntary, Respondent did not present any evidence at the 6 June 2018 hearing, as Respondent did not attend the hearing on this date. As the above testimony in support of Finding 17 shows, Judge Shirley

testified Respondent "readily agreed" to sign the release. Further, Kellie Myers, who witnessed Respondent sign the release, testified Respondent did not object or complain about signing the release. Therefore, Finding 19 is supported by competent evidence.

Lastly, Respondent challenges Finding 23, which states: "After the hearing in this matter was concluded on June 6, 2018, [Respondent] sent communications to the Court regarding this matter. Because these communications were not offered as evidence or argument during the hearing in this matter, the communications have not been reviewed or considered by the Court."

Respondent contends this Finding is "not supported by the evidence as the Prosecutor represented to the trial court that Respondent had emailed him a medical opinion on 5 June 2018." However, we fail to see how this assertion renders the Finding erroneous. Finding 23 simply indicates the trial court did not consider any post-hearing submissions by Respondent in reaching its decision. Given Respondent did not testify and Respondent's 5 June 2018 email was not received into evidence, this Finding is not erroneous.

II. Subject Matter Jurisdiction

[2] Respondent challenges the trial court's Conclusion 1, which states: "This Court has personal and subject matter jurisdiction." Respondent contends this Conclusion is erroneous because the Show Cause Order was in violation of several subsections of Chapter 5A of our General Statutes, which relate to criminal contempt, thereby depriving the trial court of subject matter jurisdiction and rendering the Disability Order null and void. However, this action was not a criminal contempt proceeding; rather, the Show Cause Order and Disability Order stem from the trial court's inherent authority to regulate the conduct of attorneys appearing before it. Thus, Chapter 5A is inapplicable to this case.

The courts of this State have inherent authority to regulate the conduct of attorneys practicing in this State:

> Attorneys are answerable to the summary jurisdiction of the court for any dereliction of duty except mere negligence or mismanagement. A court may enforce honorable conduct on the part of its attorneys and compel them to act honestly toward their clients by means of fine, imprisonment or disbarment. The power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them

> from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice.

In re Burton, 257 N.C. 534, 542-43, 126 S.E.2d 581, 587-88 (1962) (citation and quotation marks omitted).

The inherent powers of the judicial branch are those powers that are "essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987); *see also Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 665, 554 S.E.2d 356, 362 (2001) ("All courts are vested with inherent authority to do all things that are reasonably necessary for the proper administration of justice." (citations and quotation marks omitted)). Our Supreme Court has noted that this inherent authority encompasses not only the "power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct." *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (citation omitted).[2] Further, this Court has stated, "[t]here is no question that a Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *In re Robinson*, 37 N.C. App. 671, 676, 247 S.E.2d 241, 244 (1978).

Although we have found no case addressing the trial court's authority with regard to placing attorneys on disability inactive status, a trial court's inherent authority to regulate attorneys before it must also include the authority to place an attorney on disability inactive status under appropriate circumstances.[3] Just as our trial courts have the inherent authority to impose sanctions upon attorneys appearing before them, there is no question that a superior court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that

---

2. Indeed, in *In re Hunoval*, the Supreme Court was exercising its own inherent authority by entering an order of discipline against an attorney practicing before it. *See id.*

3. We also find support for this conclusion in the definition of "disability inactive status" found in the North Carolina State Bar Rules, which defines this class as "members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney, *as determined by the courts* . . . ." *See* 27 N.C. Admin. Code 1A.0201(c)(2)(C) (emphasis added). This definition assumes a trial court has the necessary authority to transfer an attorney practicing before it to disability inactive status.

the administration of justice is accomplished as expeditiously as possible, has the authority to transfer an attorney to disability inactive status. *See id.* at 676-77, 247 S.E.2d at 244-45 (recognizing a court's inherent authority to impose reasonable and appropriate sanctions upon lawyers practicing before it); *see also In re Beasley*, 151 N.C. App. 569, 571-73, 566 S.E.2d 125, 127-28 (2002) (upholding a trial court's order, entered pursuant to its inherent authority, suspending an attorney's license for substance abuse issues).[4]

Here, the Show Cause Order states Respondent was to show cause why, *inter alia*, he should not be placed on disability inactive status. The Show Cause Order further provides the trial court "initiat[ed] this action on its own motion, pursuant to its inherent authority to regulate the conduct of officers of the court." In the Disability Order, the trial court explicitly found that Respondent was impaired and pursuant to its inherent authority, ordered Respondent be placed on disability inactive status. Because the trial court at all times was acting pursuant to its inherent authority to regulate officers of the court, the trial court had subject matter jurisdiction to enter its Disability Order.

III. Due Process

[3] Respondent next challenges Conclusion 3, which reads: "[Respondent] received appropriate notice of these proceedings." Respondent alleges this Conclusion is erroneous because it "is not supported by evidence nor does it follow from the Findings of Fact[,]" and because Judge Shirley violated N.C. Gen. Stat. § 5A-13(a), which deals with notice procedures when deferring proceedings for direct criminal contempt.

As already discussed, Judge Shirley's Show Cause Order was issued pursuant to the trial court's inherent authority and was not a criminal contempt proceeding. Therefore, N.C. Gen. Stat. § 5A-13(a) is inapplicable. Further, the Record shows Respondent was served with the Show Cause Order at least 17 days prior to the 1 June 2018 hearing, and at this hearing, Respondent appeared and did not object to service of the Show Cause Order. *See*, *e.g.*, *In re Howell*, 161 N.C. App. 650, 655-56, 589 S.E.2d 157, 160 (2003) (explaining a general appearance and failure to object by a party in an action can waive defense of insufficiency of service of process). Therefore, Conclusion 3 is supported by the Findings.

---

4. Indeed, all of the judges' efforts below were clear attempts to take proactive remedial steps in order to avoid formal discipline and provide assistance to Respondent.

In a similar vein, Respondent also alleges the trial court violated his due process rights by failing to give him notice. *See In re Burton*, 257 N.C. at 543, 126 S.E.2d at 588 ("A license to engage in business or practice a profession is a property right which cannot be taken away without due process of law." (citation and quotation marks omitted)).

We conclude Respondent was given due notice of the proceedings. *See*, *e.g.*, *id*. Here, Respondent first learned Judge Shirley intended to file the Show Cause Order on 6 April 2018. Pursuant to the LAP Agreement, Judge Shirley waited to file the Show Cause Order as long as Respondent participated in the LAP. However, when Respondent revoked the LAP Agreement on 2 May 2018, Judge Shirley resorted to filing the Show Cause Order, as he had explicitly informed Respondent he would do if Respondent failed to comply with the LAP Agreement. Respondent was personally served with the Show Cause Order on 15 May 2018. The Show Cause Order detailed the allegations against Respondent and ordered Respondent to attend a hearing to determine "whether [Respondent is] presently suffering from a mental or physical condition (which may include but is not limited to mental illness and/or substance abuse) which significantly impairs [Respondent's] professional judgment, performance, or competency as an attorney." Prior to the hearing on 1 June 2018, Respondent hired counsel to represent him at this hearing; however, Respondent allowed counsel to withdraw on the day of the hearing. In addition, the hearing on Judge Shirley's Show Cause Order was presided over by Judge Ridgeway, who had had no previous involvement with Respondent or the events leading up to the Show Cause Order. At the hearing on 1 June 2018, Respondent represented himself, cross-examined the State's witnesses, and presented evidence. Respondent, however, failed to attend the second day of the hearing on 6 June 2018. Based on these facts, we conclude Respondent was provided due process.

IV. Disability Inactive Status

[4] Lastly, Respondent challenges Conclusions 4 through 7, which state as follows:

> 4. [Respondent's] conduct, as set out in the Findings of Fact above, demonstrates that [Respondent] suffers from a mental or physical condition that materially impairs his performance, judgment or competence as an attorney.
>
> 5. Due to [Respondent's] inability to effectively handle his clients' matters, and the delays caused by his appearances

> in court in an impaired condition, his continuing to practice law poses a threat of significant potential harm to his clients, to the public, to the profession, and to the administration of justice.
>
> 6. It is in the best interest of [Respondent's] clients, the public, the profession and the administration of justice that [Respondent] should be placed on disability inactive status until [Respondent] has been evaluated and treated for his impaired condition.
>
> 7. It is in the best interest of [Respondent], his clients, the public, the profession and the administration of justice for [Respondent] to undergo, under the supervision of the Lawyers Assistance Program ("LAP") or some other qualified provider approved by this Court, a substance abuse evaluation, a psychiatric evaluation and a fitness to practice evaluation, and to follow all treatment recommendations found to be appropriate, prior to returning to active practice.

Respondent essentially argues these Conclusions are not supported by the Findings because (1) the Findings are not supported by competent evidence and (2) Respondent had provided a medical opinion to the Deputy Counsel for the State Bar, who had been appointed to prosecute this matter, on 5 June 2018 that Respondent was competent to practice law. With regard to the 5 June 2018 medical opinion, Respondent failed to appear at the 6 June 2018 hearing and did not present any evidence of this medical opinion throughout the two hearings. Because this 5 June 2018 medical opinion was not admitted, the trial court did not err by failing to consider this opinion.

As for Respondent's remaining argument, we have already determined the Findings were supported by competent evidence, and we hold these Findings support the trial court's Conclusions. Specifically, the Record shows all six of the State's witnesses testified to believing Respondent was impaired on two separate occasions, 29 March 2018 and 6 April 2018. Both Judges Dunston and Shirley testified they believed it was in Respondent's best interest, and the interest of the proper administration of justice, that he should be placed on disability inactive status until he has been evaluated and treated for his impaired condition. Therefore, we hold the trial court's Conclusions of Law are supported by the Findings of Fact and the trial court did not abuse its discretion by placing Respondent on disability inactive status.

Conclusion

Accordingly, based on the foregoing reasons, we affirm the trial court's Disability Order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

IN THE MATTER OF J.C.D.

No. COA18-957

Filed 21 May 2019

1. Mental Illness—involuntary commitment—physician's report—right to confront physician—failure to assert

In an involuntary commitment hearing, the trial court did not err by admitting a physician's report into evidence pursuant to N.C.G.S. § 122C-268(f) where respondent did not object and did not assert her right to have the physician appear to testify.

2. Mental Illness—involuntary commitment—ultimate finding—mentally ill and dangerous to self and others—sufficiency of findings—conflicts in evidence

An involuntary commitment order lacked findings sufficient to support its ultimate finding that respondent was mentally ill and dangerous to herself and others, where the findings were simply the facts stated in a physician's letter, which the order incorporated by reference. The order lacked any findings based upon another witness's or respondent's testimony, and it failed to resolve conflicts in the evidence.

3. Mental Illness—involuntary commitment—sufficiency of evidence—dangerous to others—no evidence

An involuntary commitment order's conclusion that respondent was dangerous to others was vacated where there was no evidence that respondent had threatened to, attempted to, or actually harmed anyone—or that respondent had previously done so.

Appeal by respondent from order entered 14 March 2018 by Judge J. Henry Banks in District Court, Halifax County. Heard in the Court of Appeals 27 February 2019.

IN RE J.C.D.

[265 N.C. App. 441 (2019)]

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for respondent-appellant.

STROUD, Judge.

J.C.D. ("Respondent") appeals from an involuntary commitment order which committed her to Halifax Regional Medical Center ("HRMC") for up to 30 days. We vacate the district court's order and remand for additional findings of fact and entry of a new order.

I. Background

Respondent, age 76, presented to the emergency room with bruising on the left side of her mouth and eyes and rambling speech. Respondent was initially examined by Dr. E. Conti at HRMC. Dr. Conti noted Respondent had stated her daughter had hit her, and she had rambling speech focused on her daughters trying to take advantage of her. Dr. Conti recounted Respondent had a history of "delusional" disorder and determined Respondent was "mentally ill," "dangerous to self," and "dangerous to others."

On the Examination and Recommendation to Determine Necessity for Involuntary Commitment Form ("commitment form"), Dr. Conti states, "daughter reports that [Respondent] has been doing dangerous things such as walking long distances to the store in a bad neighborhood, telling strangers her personal buisness [sic] and inviting strangers into her home. Daughter also reports that [Respondent's] guns were take [sic] away from her due to threatening behavior."

Respondent was examined by Dr. Ijaz the following day to determine the continued necessity for involuntary commitment. Dr. Ijaz determined Respondent was "mentally ill," "dangerous to self," and "dangerous to others." The commitment form completed by Dr. Ijaz indicates "[Respondent] presents with occular [sic] and facial bruising. She maintains that her daughter assulted [sic] her because she would not sell her house." Dr. Ijaz found Respondent was "at risk of causing harm to herself or others due to her impaired judgement and delusional thinking and requires inpatient hospitalization for stabilization and treatment."

Dr. Conti signed an affidavit and petition requesting involuntary commitment of Respondent on 8 March 2018. An involuntary commitment

hearing was held on 14 March 2018. Respondent was represented by counsel. The only witness who testified for the hospital was Latasha Motley, who was employed by HRMC. Respondent also testified. All parties indicate the transcript is unintelligible regarding Ms. Motley's specific job title at HRMC. Ms. Motley identified her role as being involved with "psychiatric discharge," but she also testified about Respondent's course of care in the hospital. Petitioner also offered as evidence a report by Dr. Ijaz, who had evaluated and treated Respondent. The report was admitted without objection from respondent.

The trial court announced at the conclusion of the hearing it found there were facts supporting the involuntary commitment, and it would incorporate by reference as findings in the order the report signed by Dr. Ijaz and offered by Ms. Motley. The trial court also announced that it found respondent mentally ill and a danger to herself and others and committed her for up to 30 days.

The court's written order, filed after the hearing, is on North Carolina Administrative Office of the Courts form order SP-203. In the "Findings" portion of the form,[1] box number four was marked:

> Based on the evidence presented, the Court
>
> 4. by clear, cogent, and convincing evidence, finds as facts all matters as set out in the physician's/eligible psychologist's report specified below, and the report is incorporated by reference as findings.
>
> Date of Last Examiner's Report *3-14-18*
>
> Name of Physician/Eligible Psychologist *Dr. Ijaz*

The trial court also marked box five:

> 5. by clear, cogent, and convincing evidence, finds these other facts:
>
> . . .

1. Italics indicate hand-written additions to Form 203; the remainder is the preprinted text of the form.

facts supporting the involuntary commitment:

> *All facts as set out in the physician's report date 3-14-18. The physician's report shall be incorporated by reference as evidence to support this order.*

Dr. Ijaz's letter which was incorporated by reference stated:

> [Respondent] is a 76 year old female admitted to Halifax Regional on March 4, 2018, under Involuntary Commitment Order, with a diagnosis of Possible Neurocognitive D/O (Alzheimer's disease). Patient presented to the Emergency Care Center on this date with reports of confusion, auditory and visual hallucinations, flight of ideas and confabulation prior to admission. Patient was checked and has been cleared for all things medical that could produce these symptoms in patients.
>
> **Psychiatric Medications**
>
> Xanax 0.5mg BID PO Antianxiety
>
> Since being on the unit, patient has shown some improvement. However she still presents with intermittent episodes of confusion and paranoia. She is easily redirected at this time with no agitation or verbally aggressive behaviors as initially presented upon admission to the unit. Patient is compliant with medications and unit activities at present. In my opinion, patient is a danger to self, due to level of confusion and confabulation. I recommend that patient remain on the inpatient psychiatric unit for up to 30 days for further stabilization and to formulate an effective discharge plan. Patient's daughter petition the court and became her legal guardian so that she can make necessary decisions for patient's care due to change in patient's mental status and concerns for her safety.

The court concluded Respondent was mentally ill and a danger to herself and others. Respondent timely appealed.

II. Jurisdiction

An appeal of right lies with this Court from a final judgment of involuntary commitment. N.C. Gen. Stat. § 7A-27(b)(2) (2017); N.C.

Gen. Stat. § 122C-272 (2017). "[A] prior discharge will not render questions challenging the involuntary commitment proceeding moot. When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot." *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009) (citations and quotation marks omitted). This appeal is not moot even though Respondent's commitment period has expired.

III. Issues

Respondent argues the trial court erred by ordering her commitment, where the only findings of fact were solely those incorporated from and set out in the non-testifying physician's report. She asserts findings were insufficient to support the conclusion she was dangerous to herself and others. Respondent also asserts a denial of her statutory right to effective assistance of counsel.

IV. Standard of Review

The trial court is required to support its findings of fact and ultimate conclusion that Respondent "is mentally ill and dangerous to self . . . or dangerous to others" by "clear, cogent and convincing evidence." N.C. Gen. Stat. § 122C-268(j) (2017). Further, "[t]he court shall record the facts that support its findings." *Id.*

> On appeal of a commitment order our function is to determine whether there was any competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the "facts" recorded in the order.

In re Whatley, 224 N.C. App. 267, 270, 736 S.E.2d 527, 530 (2012) (citation omitted); *see also In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) ("On appeal of a commitment order our function is to determine . . . whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the 'facts' recorded in the order.").

V. Admissibility of Physician's Report

[1] Respondent first argues that "[t]he admission of Dr. Ijaz's report, without Dr. Ijaz's presence at the hearing, constituted a denial of J.D.'s right to confront and cross-examine the witness." Respondent contends that based upon N.C. Gen. Stat. § 122C-268(f), Dr. Ijaz's report was

improperly admitted as evidence because she did not appear at the hearing to testify.

N.C. Gen. Stat. § 122C-268(f) provides that "[c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f) (2017). Respondent suggests that because her "right to confront and cross-examine witnesses may not be denied," Dr. Ijaz's report could not be admitted unless she appeared to testify. Respondent's counsel failed to object to admission of Dr. Ijaz's report as evidence under N.C. Gen. Stat. § 122C-268(f) or for any other reason. Although Respondent had a right to object to admission of the report without Dr. Ijaz's testimony, she waived this right by her failure to object. N.C. R. App. P. 10(a)(1). Respondent's interpretation of the statute—that she has a non-waivable right for the physician to appear and testify—is the opposite of what the statute allows. N.C. Gen. Stat. § 122C-268(f) specifically allows the physician's report to be admitted into evidence. Since respondent did not object to admission of the report, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report.

VI. Sufficiency of Findings of Fact under N.C. Gen. Stat. § 122C-268(j)

[2] The trial court's ultimate findings of mental illness and dangerous to self or others must be based upon clear, cogent, and convincing evidence and be "supported by the 'facts' recorded in the order." *Whatley*, 224 N.C. App. at 270, 736 S.E.2d at 530. "But unlike many other orders from the trial court, these ultimate findings, standing alone, are insufficient to support the order; the involuntary commitment statute expressly requires the trial court also to record the facts upon which its ultimate findings are based." *In re W.R.D.*, ___, N.C. App. ___, ___, 790 S.E.2d 344, 347 (2016) (citation and quotation marks omitted). The order for Respondent's involuntary commitment indicates the trial court had "incorporated by reference" Dr. Ijaz's report as the "clear, cogent, and convincing evidence" of Respondent's mental illness and danger to herself. The facts found by the trial court to support its conclusions and order were simply the facts set out in Dr. Ijaz's letter and did not include any findings based upon Ms. Motley's or respondent's testimony at the hearing. Respondent does not challenge the specific facts as incorporated from Dr. Ijaz's letter as unsupported by the evidence but argues here that the incorporation alone is not sufficient under N.C. Gen. Stat. § 122C-268(j). Thus, the issue is whether the incorporation by reference

of Dr. Ijaz's report was sufficient to comply with the statutory mandate for the trial court to "record the facts that support its findings." N.C. Gen. Stat. § 122C-268(j). Given the higher standard for findings of fact set forth by N.C. Gen. Stat. § 122C-268(j) than in many other types of orders, we agree and hold that the findings are not adequate to support the ultimate conclusion.

Based upon the incorporation of Dr. Ijaz's letter, the trial court made findings that Respondent "is a 76 year old female admitted to Halifax Regional on March 4, 2018; she had a "diagnosis of Possible Neurocognitive D/O (Alzheimer's disease);" she "presented to the Emergency Care Center on this date with reports of confusion, auditory and visual hallucinations, flight of ideas and confabulation prior to admission;" she "was checked and has been cleared for all things medical that could produce these symptoms in patients;" she had a prescription for "Xanax 0.5mg BID PO Antianxiety;" she "has shown some improvement" while in the hospital but "she still presents with intermittent episodes of confusion and paranoia;" "She is easily redirected at this time with no agitation or verbally aggressive behaviors as initially presented upon admission to the unit;" and she was "compliant with medications and unit activities at present." The trial court also found by incorporation of Dr. Ijaz's report that Respondent "is a danger to self, due to level of confusion and confabulation" and that she should "remain on the inpatient psychiatric unit for up to 30 days for further stabilization and to formulate an effective discharge plan."

We must therefore consider whether the trial court's findings of fact, made by incorporation of Dr. Ijaz's report, were sufficient to comply with the statutory requirements to "record the facts which support its findings." N.C. Gen. Stat. § 122C-268(j). Certainly, the trial court's order included more detail than those cases in which the only findings were 'checking the boxes" on the form, with no other indication of the facts upon which it relied. Merely "placing an 'X' in the boxes" of the form order has been disapproved repeatedly, as noted in *Matter of Jacobs*, where respondent

> assign[ed] as error the district court's failure to make findings of fact to support its commitment order. G.S. 122-58.7(i) provides in unambiguous terms: "The court shall record the facts which support its findings." This Court has held on numerous occasions that the district court must record the facts necessary to support its findings. We note that the commitment order in the case *sub judice* is essentially identical to that order found to

> be insufficient in *In Re Koyi*, *supra*. Merely placing an "X" in the boxes on the commitment order form does not comply with the statute.

38 N.C. App. 573, 575, 248 S.E.2d 448, 449 (1978). It is not uncommon, and is specifically provided as an option on AOC Form 203 for the trial court to incorporate the physician's report as at least a portion of the findings of fact in the order. Yet where there is "directly conflicting evidence on key issues," incorporation of a document or other evidence is not sufficient for this Court to determine if the trial court resolved the conflicts in the evidence to the required standard and burden of proof by petitioner, and we must remand for findings of fact resolving the factual issues. *See In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000) ("These findings are simply a recitation of the evidence presented at trial, rather than ultimate findings of fact. In a nonjury trial, it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected. Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." (citations omitted)); *see also In re Allison*, 216 N.C. App. 297, 300, 715 S.E.2d 912, 915 (2011) ("The trial court used a locally modified form involuntary commitment order and in making its findings of fact checked the box stating, 'Based on the evidence presented, the Court by clear, cogent and convincing evidence finds these other facts: Court Finds That The Respondent Meets Criteria For Further Inpatient Commitment.' The trial court did not make any written findings of fact or incorporate by reference either physician's report. Had the trial court utilized the standard Administrative Office of the Courts form involuntary commitment order and entered the findings of fact required by that form, this remand may not have been necessary as the evidence tends to show that respondent is likely mentally ill and potentially dangerous to himself and to others. But, the trial court's checking of a box on its locally modified form is insufficient to support this determination."). If the report incorporated into the order does not include sufficient facts to support the trial court's conclusions, remand may be necessary for additional findings. For example, in *In re Booker*, the respondent's sister, his physician, and respondent testified at the hearing, and there were substantial conflicts in the evidence. 193 N.C. App. 433, 667 S.E.2d 302 (2008). The trial court's order incorporated the physician's

report, but that report included minimal information and there were no additional findings to resolve the conflicts in the evidence so remand was necessary:

> In its order, the trial court checked the box on the printed form that reads: "Based on the evidence presented, the Court by clear, cogent and convincing evidence finds as facts all matters set out in the physician's report, specified below, and the report is incorporated by reference as findings." The date of the last physician's report was 13 November 2007 and the physician's name listed was Dr. P.R. Chowdhury. The next box on the printed form that provided a section for other findings of fact to be recorded was not checked and no other findings of fact were recorded in the order.
>
> The 13 November 2007 report stated it was Dr. Chowdhury's opinion that Respondent was mentally ill, dangerous to himself, and dangerous to others, but the only "matters set out in" the report as findings by Dr. Chowdhury were that Respondent was a "56 year old white male, with history of alcohol abuse/dependence, admitted with manic episode. He continues to be symptomatic with limited insight regarding his illness." These findings by Dr. Chowdhury "incorporated by reference" in the trial court's order are insufficient to support the trial court's determination that Respondent was dangerous to himself and to others.

Id. at 437, 667 S.E.2d at 304 (brackets omitted). In contrast, this Court has also held that the trial court's incorporation by reference of the physician's report included sufficient facts to support the trial court's conclusion that the respondent presented a "danger to himself." *See In re Zollicoffer*, 165 N.C. App. 462, 468-69, 598 S.E.2d 696, 700 (2004) ("Judge Senter's involuntary commitment order incorporates Dr. Soriano's examination and recommendation of 3 June 2003 in his findings of fact. In Dr. Soriano's recommendation she states that respondent has a history of chronic paranoid schizophrenia, that respondent admits to medicinal non-compliance which puts him 'at high risk for mental deterioration,' that respondent does not cooperate with his treatment team, and that he 'requires inpatient rehabilitation to educate him about his illness and prevent mental decline.' These findings of fact were not objected to in respondent's assignments of error, thus they are binding on appeal.").

Here, the facts included in Dr. Ijaz's report were more detailed than those in *Booker*, but still did not address conflicts in the evidence or resolve questions of credibility. The trial court's findings did not address Ms. Motley's testimony at all and did not resolve any conflicts in the evidence presented by Respondent's testimony. Respondent testified in her own defense. Her testimony was rambling and not always coherent, but she testified that she had lived alone for over 20 years and was able to take care of herself. She also testified that her daughter, who worked at the hospital where she was involuntarily committed, was "working together" with the hospital personnel to "permanently put [her] somewhere." "If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected." *Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365-66.

The trier of fact could draw from the evidence an inference that Respondent's daughter was simply seeking to put her away, and, because she worked at the hospital, the physicians there were helping her. Respondent drove and presented herself with physical injuries at the emergency room, but was immediately taken for involuntary commitment evaluation by the nurses who stated Respondent's daughter told them that Respondent was mentally ill. Or the trier of fact could infer that Respondent's paranoia and confusion led her to believe that her daughter was seeking to harm her when she was actually trying to protect Respondent. But only the trial court can draw these inferences or any other potential inferences based on the evidence. This Court does not resolve issues of credibility and "[w]e do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof." *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. This Court does not review whether the trial court properly adjudicated all the evidence under the applicable burden of proof and whether its findings of fact support its conclusions. The trial court's order did not resolve the conflicts in the evidence and did not fully state the facts upon which its conclusions rested, so we must remand for additional findings of fact.

VII. Sufficiency of Evidence to Support Findings

[3] We also note that although evidence was presented at the hearing which could, if the trial court adjudicates conflicts in the evidence and makes the required findings of fact, support a conclusion that Respondent was "dangerous to self," there was no evidence she was "dangerous to others." In relevant part, N.C. Gen. Stat. § 122C-3(11) provides that one is "dangerous to self" when:

> [w]ithin the relevant past:
>
> 1. The individual has acted in such a way as to show:
>
>> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety[.]

N.C. Gen. Stat. § 122C-3(11) (2017).

There was evidence that Respondent's daughter was seeking treatment for her because she was dangerous to herself, and she had demonstrated the potential for harming herself most recently by her fall, by which she was actually injured, and frequent calls from neighbors reporting she was wandering in the streets. Ms. Motley testified regarding Respondent's condition upon admission to the hospital and the reasons for her admission:

> She came in. She did have the entire left side of her face was bruised. When she initially came into the hospital she told us that her daughter . . . had beaten her and she said that had happened before Christmas, a couple weeks or the week before Christmas. Since being on the unit she has come back and said that's not what happened at all, she remembered that she was scrubbing her floor and she slipped and fell and hit her face. It's the confusion and the wandering in the streets as described by her neighbors, her being out in the street and they're afraid that something may happen to her as well so that's why she was actually brought into the hospital for the bruising and the confusion and the wandering.

The evidence tends to show that Respondent was diagnosed with "possible neurocognitive disease disorder which is Alzheimer's disease." She had psychiatric hospitalizations at least twice before for this condition. Dr. Ijaz noted that respondent's symptoms upon admission were "confusion, auditory and visual hallucinations, flight of ideas, and confabulation." The term "confabulation" as used in the medical context refers to "filling in of gaps in memory through the creation of false memories by an individual who is affected with a memory disorder . . . and is unaware that the fabricated memories are inaccurate and false[.]"

Merriam-Webster, https://www.merriam-webster.com/medical/confabulation (last visited May 1, 2019). Respondent's own testimony at the hearing could also support Dr. Ijaz's findings of confusion, flight of ideas, and confabulation.

But there was no evidence, including in Dr. Ijaz's report, that respondent was dangerous to others. N.C. Gen. Stat. § 122C-3(11) defines "dangerous to others" as:

> [w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct.

N.C. Gen. Stat. § 122C-3(11)(b).

There was no evidence that respondent had "inflicted or attempted to inflict or threatened to" harm anyone or of any "previous episodes of dangerousness." The court's conclusions that Respondent is mentally ill and dangerous to self *and others* are based solely upon the incorporated "facts set out in" Dr. Ijaz's letter. But Dr. Ijaz did not state any opinion that Respondent was dangerous "to others;" her opinion was only that "patient is a *danger to self*, due to level of confusion and confabulation." (Emphasis added.) Nor did Ms. Motley testify that Respondent had threatened anyone or presented any danger to others. No evidence was presented to support any findings or conclusion that Respondent was dangerous to others. The trial court's conclusion she was dangerous *to others* was not supported by either the evidence or findings of fact and must be vacated without remand.

VIII. Ineffective Assistance of Counsel

Respondent argues that "she was denied effective counsel when her attorney conceded that [she] should be involuntarily committed, an argument which was in stark contrast to her wishes." However, no prior case has determined that either *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) (finding a criminal ineffective assistance of counsel claim to require deficient performance and prejudice), or *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (finding

where defendant's counsel admits to guilt in a criminal proceeding without defendant's consent to be per se ineffective assistance of counsel), are applicable to an involuntary commitment hearing. Even if we presume that an ineffective assistance of counsel claim is potentially available to a respondent denied their liberty in an involuntary commitment case, it is unnecessary for this Court to address this issue here. Since we must vacate and remand for additional findings of fact, any potential prejudice to Respondent from her counsel's argument can be addressed by the trial court on remand.

IX. Conclusion

The court's order contains insufficient findings to support its determination that Respondent was dangerous to herself or to others. *See Whatley*, 224 N.C. App. at 270, 736 S.E.2d at 530. Because the trial court failed to make sufficient findings of fact resolving material conflicts in the evidence, adjudicate questions of credibility, and only made findings by incorporation of Dr. Ijaz's report, we must vacate the order and remand for additional findings of fact regarding dangerousness to self and entry of a new order. Because there was no evidence to support a conclusion that Respondent was dangerous to others, we vacate the trial court's conclusion on that issue without remand. The commitment order is vacated and the matter is remanded.

VACATED AND REMANDED.

Judges TYSON and ARROWOOD concur.

IN RE M.T.-L.Y.

[265 N.C. App. 454 (2019)]

IN THE MATTER OF M.T.-L.Y.

No. COA18-826

Filed 21 May 2019

1 Termination of Parental Rights—effective assistance of counsel—denial of motion to continue

A mother was not deprived of her right to the effective assistance of counsel by the trial court's denial of a motion to continue a termination of parental rights hearing where the mother communicated regularly with her attorney for several months prior to the hearing and she provided no explanation as to how her attorney would have been better prepared had the hearing been continued.

2. Child Abuse, Dependency, and Neglect—permanency planning—section 7B-906.2(b)—concurrent plans—reunification efforts ceased

Based on prior case law interpreting N.C.G.S. § 7B-906.2(b), the trial court erred by removing reunification as a concurrent plan after the first and only permanency planning hearing for a neglected child, requiring the Court of Appeals to vacate the initial permanent plan and subsequent order terminating a mother's parental rights. The trial court's order ceasing reunification efforts, however, contained sufficient findings that addressed the relevant statutory factors and were supported by evidence.

Appeal by respondent-mother from order entered 18 April 2018 by Judge Laurie L. Hutchins in Forsyth County District Court. Heard in the Court of Appeals 13 March 2019.

Erica Glass for petitioner-appellee Forsyth County Department of Social Services.

Parent Defender Wendy Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent appellant-mother.

Parker Poe Adams & Bernstein LLP, by Catherine R.L. Lawson, for guardian ad litem.

INMAN, Judge.

Respondent-mother ("Mother") appeals, pursuant to N.C. Gen. Stat. § 7B-1001(a)(5)a., from the trial court's permanency planning order and the order terminating her parental rights over her daughter, Megan.[1] Mother argues that the trial court (1) violated her constitutional right to effective assistance of counsel when it denied her attorney's motion for continuance at the termination hearing; (2) erred in eliminating reunification as a permanent plan; and (3) erred by ordering that reunification efforts cease. After careful review of the record and applicable law, we affirm the trial court's denial of the motion for continuance and the order ceasing reunification efforts. But we conclude that recent precedent requires that we vacate the permanency planning and termination orders and remand this matter for further proceedings because the trial court failed to include reunification as an initial permanent plan.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record reflects the following facts:

On 29 July 2016, Megan was born prematurely at 34 weeks to Mother and Father (collectively "the parents"). At birth, Megan exhibited abnormalities and the parents were told to attend follow-up appointments with the pediatrician. After the parents missed two appointments, the Dare County Department of Social Services ("DDSS") became involved.

Father was charged with possession of cocaine on 9 September 2016. On 12 September 2016, DDSS and Mother agreed to a safety plan that Father was to only have supervised contact with Megan. Mother did not follow this plan. She left Megan in Father's care unsupervised at times when she could not find suitable care.

On 21 September 2016, the Dare County Sheriff's Office arrested Father pursuant to a warrant and, following a search of the parents' home, discovered a "marijuana pipe, 10 used syringes, and a spoon with cocaine residue." The next day, DDSS and Mother agreed to a new safety plan, stipulating that, among other things, Father would no longer reside in the home. Mother again failed to adhere to the safety plan. She allowed Father to return to their home, prompting DDSS to file a juvenile petition claiming that Megan was a neglected juvenile. On 23 September 2016, the trial court ordered that Megan be placed in non secure custody with DDSS.

---

1. To preserve anonymity, we use the above pseudonym to refer to the juvenile. Respondent-father ("Father") is not a party to this appeal nor was he involved in any of the trial court proceedings.

Following a custody hearing on 3 October 2016, the trial court continued non secure custody but placed Megan into the care of her maternal grandmother, who lived in Winston Salem, within Forsyth County. Megan's maternal grandmother was also caring for Mother's two other juvenile children stemming from a voluntary placement agreement with DDSS. Mother was allowed unlimited supervised visitation so long as it was inside the grandmother's home.

Although the plan approved by the trial court was for Mother to reside in Winston Salem and provide regular care to her two other children and Megan in their grandmother's home, she did not follow through. She lived with the grandmother for two days, but then left, and visited Megan only once between 5 and 20 October. Mother struggled to sustain a proper living situation and had no contact with DDSS following the custody hearing until 20 October 2016, when the grandmother fell ill and could no longer care for the children. DDSS assumed care of Megan and placed her into her former foster care home.

Mother and Father then stipulated that Megan was a neglected juvenile pursuant to Section 7B-101(15) of our General Statutes. On 14 November 2016, after an adjudication hearing, the trial court adjudicated Megan neglected and ordered that she remain in non secure custody of DDSS. Mother was allowed "at least one visit" with Megan before a December dispositional hearing date and any other visits "as may be arranged," on the conditions she participate in mental health and substance abuse treatment services, undergo psychological evaluations, refrain from consumption of alcohol and drugs, submit to drug testing, establish stable housing, and maintain regular communication with DDSS.

Mother's living and work circumstances reportedly improved, although they were not verified to the trial court or DDSS. Mother told DDSS that she rented a room in her uncle's[2] house in Winston Salem and that he employed her to do office work in his real estate business.

In January 2017, the trial court transferred Megan's case to Forsyth County, concluding that Dare County was an inconvenient forum, and the Forsyth County Department of Social Services ("FDSS") substituted for DDSS and placed Megan in a new foster home.

---

2. Documents in the record and the trial court referred to this same person as Mother's "father" at times and as her uncle at other times. Because Mother in her briefs refers to him as her uncle, we refer to him as such.

After a hearing in February 2017, the trial court on 17 April 2017 ordered that non secure custody remain with FDSS but that reunification efforts continue. The trial court ordered that for Mother to regain full custody of Megan, she was required to, among other things, abstain from consuming drugs and alcohol; perform any drug screening requested by FDSS, with a refusal to cooperate being interpreted as a positive result; submit to psychological evaluations; notify foster care within 24 hours of any change in her employment or household status; arrange a family services agreement to work toward reunification; participate in Megan's medical appointments; comply with the visitation plan of two visits per week at Megan's daycare under a social worker's supervision; complete parenting classes; and confirm her employment and wages.

During the next hearing, on 8 May 2017, FDSS introduced evidence that Mother had failed to comply with the court-ordered conditions to regain custody of Megan. Specifically, Mother (1) had not enrolled in or completed any parenting classes; (2) often missed, was late to, or canceled visitation appointments with Megan; and (3) did not fully cooperate with drug testing. Mother's urine tested positive for cocaine in February 2017, and she did not attend a February hair testing appointment, saying she did not think she had to go because she was required to complete a substance abuse assessment from the previous positive test. In March, Mother successfully completed a urine test but not a hair test. Although she stated previously that she had completed hair testing for Dare County, she told the trial court that she did not perform the hair test because she had never done it before. When confronted by FDSS, Mother then explained that her adherence to the religion of Islam prevented her from performing the hair tests because the test required her to cut her hair; but FDSS reported that Mother "does cut, color and not cover her hair." Mother maintained to FDSS that she was being financially supported by her uncle and was remodeling the older home and planned for her family to live there. She also stated that her uncle had promoted her to the position of vice president of his company and had increased her responsibilities and salary. However, Mother failed to provide any verification of the hours she worked, her salary, or her job title. Furthermore, Megan's social worker learned from a relative and one of Mother's older children's teachers that Father had been seen residing in Mother's home and picking up the child from school in January 2017.

Mother did not arrive at the hearing until near the end, after FDSS had introduced evidence and the trial court announced its ruling from the bench to continue custody with FDSS. By written order on 12 July 2017, the trial court kept custody with FDSS and conditioned reunification

with Megan on Mother's cooperation with all of the trial court's previously ordered conditions. The order also included findings of fact adopting the evidence presented by FDSS.

In June 2017, Mother notified Megan's social worker via email that her father was diagnosed with a terminal illness, and she traveled with her two other children to Georgia to care for him. Sometime between the end of July and early September, Mother emailed to her attorney that her father's health had deteriorated and that she no longer had a support system in Winston Salem as she could not live in her uncle's home or work for his real estate business anymore. Mother wrote in July that she was living in a motel in Portsmouth, Virginia, and that she was receiving counseling in Chesapeake, VA for her anxiety and depression. She did not have a phone until the first week of September after starting a job at a Waffle House. Though she explained that she was in dire straits, Mother told her attorney she intended to attend the next hearing in September and requested that it be continued one week.

On 8 September 2017, the trial court convened the first and only permanency planning hearing. Mother did not attend. Mother's attorney requested a continuance, arguing that additional time was needed because Mother was still out of state and wanted to send information relevant to the trial court's permanent plan via facsimile. After FDSS objected to the motion, Mother's attorney agreed for the hearing to start that day but requested that it be "continue[d] [] in progress." Mother's attorney advised the trial court that she had spoken with Mother on the phone that morning as well as the day before, and, prior to that, their last contact was by email in July.[3] Megan's social worker also stated to the trial court that her last line of communication with Mother was between 27 and 29 June 2017, when she notified Mother of Megan's ear surgery. The trial court summarily denied the motion.

Between the May and the September hearings, Mother attended only three of 37 scheduled visits with Megan, one of which she attended for 12 minutes. She last visited Megan in June. Mother never verified that she completed a substance abuse assessment; complied with drug testing for over three months; participated in Megan's medical appointments for June, July, and August 2017; notified foster care within 24 hours of

3. The record is unclear as to when Mother's attorney last communicated with her prior to the day before the permanency planning hearing. Mother's brief states that the email about her father was sent in early September, but at the September hearing, her attorney stated that the last contact was in July and that "[she] had sent letters to [Mother]" pursuant to the "last address [she] had for her."

any change in employment or household status; or complied with the family services agreement formulated in February.

On 25 October 2017, following the permanency planning hearing, the trial court found that there was a "slim likelihood of reunification" between Mother and Megan as she was (1) "not making adequate progress within a reasonable period of time;" (2) not "actively participating in or cooperating with the plan;" (3) not available to the trial court for hearings; and (4) "acting in a manner inconsistent with the health or safety" of Megan. The trial court ordered that FDSS cease reunification efforts and ordered that the primary permanent plan for Megan be adoption, with a secondary plan of guardianship.

On 9 February 2018, the trial court heard FDSS's motion to terminate Mother's parental rights regarding Megan, with Mother in attendance. Mother's attorney again motioned for a continuance, arguing that she had little contact with Mother prior to the hearing date. The trial court denied the motion.

Mother testified in the hearing that she had been residing in motels in Virginia Beach since June 2017.[4] She stated that she had been working for a construction company in Virginia since November 2017 as an insurance claims specialist and contractor, earning $650 a week, and that she had been attending parenting classes and participating in mental health and drug assistance programs. Mother, however, failed to verify her circumstances with the social worker. She also admitted that, as of the hearing date, she could not care for Megan.[5]

By order written on 18 April 2018, the trial court terminated Mother's parental rights regarding Megan[6] after finding that Mother (1) failed to verify completion of substance abuse assessments; (2) failed to adhere to drug screening requests; (3) continually had no stable living environment and did not verify her working and living situation in Virginia; (4) with the exception of three payments, failed to provide financial support for Megan; and (5) consistently had minimal to no contact with Megan, last visiting in June 2017. Mother appeals.

---

4. Mother also stated that her two older children's daycare teacher has had "custody" of them, outside of any state social services participation, since December 2017.

5. The record includes no testimony or other evidence concerning Mother's father or her time spent caring for her father in Georgia.

6. Father's parental rights were terminated as well. He did not appeal.

II. ANALYSIS

A. Effective Assistance of Counsel

[1] Mother first argues that the trial court violated her constitutional right to effective assistance of counsel when it denied her attorney's motion for continuance at the termination hearing. Generally, a trial court's decision concerning a motion to continue is reviewed for abuse of discretion; however, "the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989). Questions of law are reviewed *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights," including the right to effective assistance of counsel. *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (quotations and citation omitted). We held in *Bishop*:

> The right to effective assistance of counsel includes, as a matter of law, the right of client and counsel to have adequate time to prepare a defense. Unlike claims of ineffective assistance of counsel based on defective performance of counsel, prejudice is presumed in cases where the trial court fails to grant a continuance which is essential to allowing adequate time for trial preparation.

92 N.C. App. at 666, 375 S.E.2d at 679 (quotations and citations omitted). But, if the "lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue." *Id.* (citing *State v. Sampley*, 60 N.C. App. 493, 299 S.E.2d 460 (1983)).

In support of her argument, Mother contends that, notwithstanding that she and her attorney communicated via "phone and by e-mail and by text," they lacked sufficient face to face communication to prepare adequately for the termination hearing. The record shows that FDSS filed its motion to terminate Mother's parental rights on 17 November 2017, almost three months before the motion was heard on 9 February 2018. Additionally, Mother had the same attorney during the 8 September 2017 hearing and as early as the trial court's 17 April 2017 order keeping non secure custody of Megan with FDSS. Mother does not justify the necessity of in person preparation—other than citing bare "logistical difficulties" for the distance she had to travel—as her attorney admitted that they had otherwise been communicating effectively for several months and that Mother has had the same attorney of record for about a year.

Mother states in her brief that "[t]here was no indication from [her attorney's] motion that [she] did not keep in contact with counsel and did not attempt, as best she could, to cooperate with counsel." Mother offers no legal authority on the importance of having face to face communication with one's attorney when alternative means have been employed. Nor does she explain why or how her attorney would have been better prepared had the hearing been continued.[7] Accordingly, we hold that Mother was not deprived of effective assistance of counsel and the trial court did not err in denying the motion to continue.

B. Reunification and Reunification Efforts

[2] Mother contends that N.C. Gen. Stat. § 7B-906.2(b) required the trial court to include reunification in its initial permanent plan, so that the trial court had no statutory authority to conclude otherwise. Following controlling precedent, we agree.

When juveniles are adjudicated abused, neglected, or dependent, Chapter 7B provides for, among other things, "services for the protection of juveniles by means that respect . . . the juveniles' needs for safety, continuity, and permanence." N.C. Gen. Stat. § 7B-100(3) (2017). Chapter 7B expressly delineates the procedural responsibilities and duties of the court, the requisite county department of social services, and the affected parties. N.C. Gen. Stat. §§ 7B-100 *et seq*. (2017). Importantly, Chapter 7B establishes the "standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7B-100(4) (2017). In the event that the trial court removes custody of the juvenile from the parents, "there shall be a review hearing designated as a permanency planning hearing" within 12 months from the date of the initial order. N.C. Gen. Stat. § 7B-906.1(a) (2017).

At the permanency planning stage involving a neglected juvenile, the trial court must adopt concurrent permanent plans consisting of a primary and secondary plan. N.C. Gen. Stat. §§ 7B-906.2(a), (b) (2017). If determined to be in the juvenile's best interest, the trial court can adopt two of the six statutory plans, including adoption, guardianship,

7. In her reply brief, Mother also reasons that her attorney "did not explain to the trial court the specific reasons why she needed more time to prepare, and was not required to do so, as that would have been a violation of her duty of confidentiality." We nonetheless conclude that there was ample communication, time, and knowledge surrounding Mother's case for her attorney to prepare for the termination hearing.

reinstatement of parental rights, and reunification. N.C. Gen. Stat. § 7B-906.2(a). When deciding which plans to impose, Chapter 7B instructs the trial court as follows concerning reunification:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c)[8] or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b). The language of Section 7B-906.2(b) seems plainly to provide that a trial court, in any permanency planning hearing, can omit reunification as a concurrent plan if it determines that reunification efforts are either futile or contrary to the juvenile's well being.

Our interpretation of Section 7B-906.2(b), however, is controlled by a prior decision by this Court. Mother cites this Court's recent decision in *In re C.P.*, __ N.C. App. __, 812 S.E.2d 188 (2018), and argues that it requires this Court to vacate the trial court's order omitting reunification from its initial concurrent permanent plan. In *In re C.P.*, the respondent mother appealed the trial court's award of permanent guardianship of her child to the child's half brother following the initial permanency planning hearing. *Id.* at __, 812 S.E.2d 190. After we held that the trial court could hold joint adjudicatory, initial disposition, and initial permanency planning hearings, we agreed with the respondent mother that "reunification *must* be part of an *initial* permanent plan." *Id.* at __, 812 S.E.2d at 191 (emphasis added). We reasoned that "[t]he statutory requirement that 'reunification shall remain' a plan presupposes the existence of a prior concurrent plan which included reunification." *Id.* As such, this Court held, a trial court is only at liberty to remove reunification from

---

8. Section 7B-901(c) "authorizes the elimination of reunification efforts at an initial disposition under limited [statutorily-prescribed] circumstances" when the order puts custody of the juvenile with a department of social services. *In re J.M.*, __ N.C. App. __, __, 804 S.E.2d 830, 840 (2017) (citing N.C. Gen. Stat. § 7B-901(c)). Because the trial court first ceased reunification efforts at the initial permanency planning hearing, rather than at a dispositional hearing, Section 7B-901(c) does not apply.

the concurrent plan during *subsequent* permanency planning hearings. *Id.* The holding in *In re C.P.* requires us to hold in this case that the trial court erred in removing reunification as a concurrent plan following the first and only permanency planning hearing on 8 September 2017.

In re C.P. went on to hold that, notwithstanding the obligation to include reunification as an initial concurrent plan, Section 7B-906.2(b) allows the trial court to cease reunification efforts during an initial permanency planning hearing. *Id.* A year before *In re C.P.* was decided, this Court held in *In re H.L.* that a trial "court was permitted to [cease reunification efforts] even though [the hearing] was the first permanency planning hearing in [that] case." __ N.C. App. __, __, 807 S.E.2d 685, 693 (2017). In *In re C.P.* we explained that, contrary to *In re H.L.*'s holding, such action by the trial court conflicts with N.C. Gen. Stat. § 7B-906.1(g), which provides:

> At the conclusion of each permanency planning hearing, the judge shall make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time. *The judge shall inform* the parent, guardian, or custodian that failure or refusal to cooperate with the plan *may result* in an order of the court in a subsequent permanency planning hearing that reunification efforts may cease.

N.C. Gen. Stat. § 7B-906.1(g) (2017) (emphasis added); *accord In re C.P.*, __ N.C. App. at __, 812 S.E.2d at 191 ("[D]espite the plain language of Section 7B-906.1(g), . . . [*In re H.L.*] held that a trial court can cease reunification efforts at the first permanency planning hearing[.]"). *In re C.P.* reasoned that this provision "required prior notice to be provided to a parent before reunification efforts may be ceased;" so that the trial court was prohibited from ceasing reunification efforts in that case. However, because "case law require[d] us to follow" *In re H.L.*, we affirmed the trial court's ceasing of reunification efforts, as it made the appropriate findings required by Section 7B-906.2(b) that such efforts would have adversely affected the juvenile's health or safety. *In re C.P.*, __ N.C. App. at __, 812 S.E.2d at 191, 191 n.3 (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

The trial court in *In re C.P.* conducted its adjudicatory, initial disposition, and initial permanency planning hearings simultaneously; by contrast, in this case, the trial court staggered the hearings over a period of months. *Id.* at __, 812 S.E.2d at 190. But *In re C.P.*'s broad holding that "reunification must be part of an *initial* permanent plan" is not limited

by its other procedural circumstances. *Id.* (emphasis added). Because we cannot distinguish In re C.P.'s holding, and in particular its interpretation of Section 7B-906.2(b), we are bound to follow it. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

In that neither this Court nor our Supreme Court has cited to, followed, or analyzed the holding of *In re C.P.*, we note our reservations concerning that decision's interpretation of Section 7B-906.2(b). There are two statutory provisions in Chapter 7B that seem to contradict this Court's interpretation of Section 7B-906.2(b). First, N.C. Gen. Stat. § 7B-906.2(c) provides:

> *At the first permanency planning* hearing held pursuant to [N.C. Gen. Stat. §] 7B-906.1, the court shall make a finding about whether the efforts of the county department of social services toward reunification were reasonable, *unless reunification efforts were ceased in accordance* with [N.C. Gen. Stat. §] 7B-901(c) or *this section.*

N.C. Gen. Stat. § 7B-906.2(c) (2017) (emphasis added). Although *In re H.L.* quoted subdivision (c) to support its holding that reunification efforts could be ceased initially, *In re C.P.* did not discuss this analysis, instead reasoning that *In re H.L.* only misapplied a notice requirement in Section 7B-906.1(g). *See In re C.P.*, __ N.C. App. at __, 812 S.E.2d at 191 n.3 ("Respectfully, it appears that our Court in *H.L.* did not focus on Section 7B-906.1(g) in its entirety. The second sentence of that section requires prior notice be provided to a parent before reunification efforts may be ceased."). Second, Chapter 7B provides:

> *At each hearing*, the court shall consider . . . . Whether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety . . . . If the court determines efforts would be unsuccessful or inconsistent, the court shall schedule a permanency planning hearing within 30 days to address the permanent plans in accordance with this section and [N.C. Gen. Stat. §] 7B-906.2, *unless the determination is made at a permanency planning hearing.*

N.C. Gen. Stat. § 7B-906.1(d)(3) (2017) (emphasis added). Section 7B-906.1(d)(3) does not constrain ceasing reunification efforts to subsequent permanency planning hearings, but rather seems to allow reunification efforts to be ceased before, after, and even during the first permanency planning hearing. These statutes cannot be read in isolation. Sections 7B-906.2(c) and 7B-906.1(d)(3), when considered together,

seem to provide—consistent with our reading of Section 7B-906.2(b)—that reunification can be eliminated as a primary or secondary plan at the first permanency planning hearing, so long as the trial court makes the required statutory findings.

In re C.P.'s assertion that reunification is a precondition to the trial court's first permanent plan also brings about anomalous results and consequences that raise more questions than answers going forward. For instance, if a trial court were to order reunification initially, but correctly conclude reunification efforts should cease, it still must "order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans." N.C. Gen. Stat. § 7B-906.2(b). We are unable to identify what "efforts" social services must perform when reunification efforts have been ceased but reunification is still included in a permanent plan. A trial court order for a department of social services to cease reunification efforts seems implicitly to eliminate reunification as a permanent plan and vice versa. This example can also be applied to *In re H.L.* In that case the trial court ordered a secondary plan of reunification while also ceasing reunification efforts. *See* __ N.C. App. at __, 807 S.E.2d at 687 ('[T]he court also . . . established a secondary permanent plan of reunification."). The issue of whether reunification must be included in the initial concurrent plan was not raised on appeal in *In re H.L.*

Section 7B-1001(a)(5) also provides that a parent can appeal a final "order entered under [Section] 7B-906.2(b)," obligating the Court of Appeals to "review the order *eliminating reunification as a permanent plan*." N.C. Gen. Stat. § 7B-1001(a)(5)a. (2017) (emphasis added). If a trial court ceases reunification efforts, but includes reunification as a permanent plan, by the express language of Section 7B-1001(a)(5), an aggrieved parent does not have the statutory right to appeal that order.

Lastly, *In re C.P.* creates a dichotomy between "reunification" and "reunification efforts." One could reasonably construe both terms as being a unitary concept—*i.e.*, being mutually inclusive. This Court has alluded to this interpretation. *See In re A.P.W.*, 225 N.C. App. 534, 537, 741 S.E.2d 388, 390 (2013) (agreeing with respondent mother that "the order, while not explicitly ceasing reunification efforts, implicitly did so by changing the permanent plan to adoption and ordering the filing of a petition to terminate parental rights"); *see also In re J.N.S.*, 207 N.C. App. 670, 680, 704 S.E.2d 511, 518 (2010) ("Although the trial court failed to make any findings regarding reasonable efforts at reunification . . . the trial court effectively determined that reunification efforts . . . should

cease when it ordered DSS to file a petition to terminate respondent mother's parental rights.").

To avoid confusion of our DSS workers and trial courts and to promote permanency for children in these cases, we encourage the North Carolina General Assembly to amend these statutes to clarify their limitations.

Because *In re C.P.* and *In re H.L.* direct that a trial court can cease reunification efforts during the initial permanency planning hearing, we review Mother's arguments that the trial court here made insufficient findings to support its ruling that reunification efforts should cease. *See In re T.W.*, __ N.C. App. __, __, 796 S.E.2d 792, 796 (2016) ("[I]f reunification efforts are not foreclosed . . . pursuant to N.C. Gen. Stat. § 7B-901(c), the court may eliminate reunification as a goal of the permanent plan *only* upon a finding made under N.C. Gen. Stat. § 7B-906.2(b)." (emphasis in original)). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

When relying on Section 7B-906.2(b) for ceasing reunification efforts, the trial court must "demonstrate lack of success" regarding each of the following:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2017); *see In re D.A.*, __ N.C. App. __, __, 811 S.E.2d 729, 734 (2018) (providing that the trial court must establish the four factors in Section 7B-906.2(d) when ceasing reunification efforts under Section 7B-906.2(b)). In its permanency planning order, the trial court mirrored the statutory language and provided:

> [Mother] and [Father] are not making adequate progress within a reasonable period of time under the plan. [Mother] and [Father] are not actively participating in or cooperating with the plan, [FDSS], and the guardian ad litem for [Megan]. [Mother] and [Father] are not available to the Court, [FDSS], and the guardian ad litem for [Megan]. [Mother] and [Father] are acting in a manner inconsistent with the health or safety of the juvenile.

The trial court subsequently found and concluded that "[e]fforts towards reunification of [Megan] with [Mother] . . . should cease," concluded that a "permanent plan of adoption with a concurrent plan of guardianship" was in Megan's best interest, and ordered that reunification not be included in Megan's permanent plan.

Mother contends that some of the trial court's findings conflict with one another and therefore the order must be reversed and remanded to clarify that discrepancy. In finding of fact 30, the trial court found that "[t]here is a *slim likelihood* of reunification with [Mother] within the next six months as [she] *may have completed* some of the court ordered requirements in [Virginia]," but "has failed to provide verification of this to date." (emphasis added). But finding of fact 33 determined that "[Mother is] *not making adequate progress* within a reasonable period of time under the plan." (emphasis added).

"At any permanency planning hearing where the juvenile is not placed with a parent," the trial court must make written findings of fact pertaining to, among other things, "[w]hether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests." N.C. Gen. Stat. § 7B-906.1(e)(1) (2017). Despite Mother's argument that there is discrepancy between findings of fact 30 and 33, the trial court was merely performing its statutory mandate in determining the likelihood of reunification between Megan and Mother in the following months. The trial court succinctly concluded that, though Mother may have made some efforts to comply with court ordered conditions, she failed to verify their completion and, partly because of that, Mother was not making adequate progress. Because partially performing a required condition does not necessarily preclude a conclusion that the performance is inadequate, the findings are not contradictory.

Mother next argues that there was no evidence supporting the trial court's finding that she was "acting in a manner inconsistent with the health or safety of [Megan]" because the "court-ordered requirements[,]

which [Mother] did not follow," did not affect Megan's health and safety. We disagree. The record includes an abundance of evidence to support the trial court's finding, including: Mother (1) never verified participating in any substance abuse assessment; (2) failed to verify her living arrangements with FDSS; (3) failed to comply with the family services agreement; (4) allowed Father to supervise one of her other two children and to reside in her residence in violation of the safety plan; (5) sporadically, at best, adhered to the visitation schedule; (6) refused frequent requests to perform the necessary drug screens, and tested positive for drugs; (7) failed to verify her employment with her uncle's real estate business—including hours worked, salary, and title; and (8) never participated in Megan's mandatory medical appointments relating to the abnormalities she had upon her birth. Mother's actions need only be "inconsistent" with Megan's health or safety; her continued recalcitrance to the trial court and her responsibilities satisfy this statutory requirement.

Mother finally argues that the "trial court failed to make the ultimate finding required under Section 7B-906.2(b) 'that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " Although the trial court did not use the precise statutory language from Section 7B-906.2(b), our Supreme Court has held:

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language . . . . The trial court's written findings must address the statute's concerns, but need not quote its exact language. On the other hand, use of the precise statutory language will not remedy a lack of supporting evidence for the trial court's order.

In re L.M.T., 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013). On appellate review, we need only "consider whether the trial court's findings of fact address the substance of the statutory requirements." *Id.* at 165, 752 S.E.2d at 454 (emphasis added).

Despite Mother's contention, the trial court here made the requisite findings "address[ing] the statute's concerns," *id.* at 168, 752 S.E.2d at 455, that reunification efforts would be unsuccessful or inconsistent with Megan's well being. Throughout proceedings following Megan's removal from her custody, Mother regularly avoided her court-ordered responsibilities and continuously showed little desire to reunite with Megan. While some of the findings, as argued by Mother, could indeed

"suggest that further efforts toward reunification would not be unsuccessful or inconsistent," (emphasis omitted), we cannot conclude that the trial court's "ruling [was] so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 11, 650 S.E.2d 45, 51 (2007).

Even assuming that the trial court's permanency planning order failed to adequately establish that reunification efforts should cease, contrary to Mother's argument, its termination order provides supplemental findings that support the trial court's order ceasing reunification efforts. *See In re L.M.T.*, 367 N.C. at 170, 752 S.E.2d at 456-57 ("[I]f a termination of parental rights order is entered, the appeal of the cease reunification order is combined with the appeal of the termination order. . . . Because we consider both orders 'together,' incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order."); *cf. In re A.E.C.*, 239 N.C. App. 36, 45, 768 S.E.2d 166, 172 (2015) ("We hold that the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders."). The trial court found that Mother (1) never communicated nor verified with FDSS her exact address or employment status while residing in Virginia; (2) was residing in motels in Virginia since June 2017 and "had no place to live;" (3) other than three payments, did not pay for any medical care for Megan; and (4) stated in open court during the termination hearing that "she can not [sic] care for Megan."

III. CONCLUSION

In sum, we affirm the trial's court order denying Mother's attorney's motion for continuance because it did not violate her constitutional right to effective assistance of counsel. We vacate the trial court's initial concurrent permanent plan for failure to include reunification as either a primary or secondary plan and its order terminating Mother's parental rights, *see In re J.T.*, __ N.C. App. __, __, 796 S.E.2d 534, 537 (2017) (vacating both permanency planning order and order terminating parental rights for failure to properly cease reunification efforts), but affirm the trial court's order ceasing reunification efforts, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges STROUD and ZACHARY concur.

TODD PRESTON JACKSON, PLAINTIFF
v.
THE TIMKEN COMPANY, DEBORAH K. GENTRY, RN,
A/K/A DEBORAH GENTRY WEATHERMAN, DEFENDANTS

No. COA18-695

Filed 21 May 2019

Jurisdiction—trial court—medical negligence—incident at work —not subject to Worker's Compensation Act

A machine operator's claim that he was misdiagnosed by a company nurse after suffering a stroke at work was not covered under the Worker's Compensation Act—and therefore not subject to the exclusive jurisdiction of the Industrial Commission—because the alleged injury was not caused by an accident nor did it arise out of the employee's employment.

Appeal by Defendants from order entered 8 March 2018 by Judge Julia L. Gullett in Gaston County Superior Court. Heard in the Court of Appeals 14 November 2018.

Charles G. Monnett III & Associates, by Charles G. Monnett III and Helen S. Baddour, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Carl Newman and Samuel H. Poole, Jr., for defendants-appellants.

MURPHY, Judge.

Where an injury occurs in the course of one's employment but is not caused by an accident and does not arise out of the employment, that injury does not fall under the Workers' Compensation Act, and the injured party may not be compensated thereunder. If the Industrial Commission lacks exclusive jurisdiction to hear a claim that occurs in the course of one's employment, a trial court does not err in asserting subject matter jurisdiction over that claim.

BACKGROUND

This action was initiated in September 2017 when Plaintiff filed a civil complaint in Gaston County Superior Court asserting a claim for medical negligence against his employer, The Timken Company ("Timken"), and its company nurse, Deborah Gentry ("Gentry"). Plaintiff alleged he was

negligently diagnosed and treated after suffering a stroke at work. Prior to filing his complaint, Plaintiff had also filed a workers' compensation claim with the Industrial Commission based on the same facts. Plaintiff's workers' compensation claim was heard by a Deputy Commissioner, who issued an Opinion and Award denying Plaintiff's claim on 1 November 2017. The Opinion and Award concluded Plaintiff did not sustain an injury by accident arising out of and in the course of his employment, and therefore his suit did not fall under the Industrial Commission's jurisdiction. Plaintiff did not appeal the Industrial Commission's Opinion and Award, and that matter is not ongoing.

In lieu of answering Plaintiff's civil complaint, Defendants moved to dismiss the suit for lack of subject matter jurisdiction because "the Workers' Compensation Act provides the exclusive remedy for actions such as this against the employer . . . ." The trial court denied Defendants' motion and made the following conclusions of law:

> 1. This court has jurisdiction over the subject matter of this action.
>
> 2. The Exclusive Remedy provision of the North Carolina Workers' Compensation Act generally applies to injuries sustained in the course and scope of employment, but the provisions of the Act do not apply to this case.
>
> 3. There is no causal relationship between the Plaintiff's alleged injuries and the Plaintiff's employment at The Timken Company.
>
> 4. As determined by the Industrial Commission's Opinion and Award, the Plaintiff's alleged injuries do not arise out of the course and scope of his employment at The Timken Company.

Defendants now appeal pursuant to N.C.G.S. § 7A-27(b)(3)(a).

ANALYSIS

Defendants' only argument on appeal is that the trial court erred in denying their *Motion to Dismiss* for lack of subject matter jurisdiction. Defendants argue the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims and note that the parties stipulated as much in the action before the Industrial Commission. "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

We first note that the parties cannot confer subject matter jurisdiction upon a court by consent or stipulation. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.") (internal quotation marks omitted); *Reid v. Reid*, 199 N.C. 740, 743, 155 S.E. 719, 720 (1930) ("Jurisdiction, withheld by law, may not be conferred on a court, as such, by waiver or consent of the parties."). The parties' stipulation of subject matter jurisdiction in the workers' compensation claim has no effect upon our consideration of the jurisdiction of the General Court of Justice.

Defendants correctly note our Workers' Compensation Act ("The Act") provides that "[i]f the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . ." N.C.G.S. § 97-10.1 (2017). Section 10.1 of The Act has been interpreted as a bar to a plaintiff's common law ordinary negligence suit against his employer or coworkers where the allegations and evidence show that their alleged harm stems from an injury by accident arising out of and in the course of the plaintiff's employment. *Abernathy v. Consolidated Freightways Corp. of Delaware*, 321 N.C. 236, 240-41, 362 S.E.2d 559. 562 (1987). However, it has never been applied where, as here, Plaintiff alleges a coworker was negligent under our medical malpractice statute. Additionally, The Act does not cover injuries that occur at one's place of work but that are not the result of an accident arising out of and in the course of that person's employment. *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 580, 364 S.E.2d 186, 188 (1988).

In resolving this appeal, we must decide, as the trial court did, whether Plaintiff's claim is covered by The Act. "An injury is compensable under [The Act] only if (1) it is caused by an 'accident,' and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't. of Envtl. Health & Nat. Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002). Here, Plaintiff argues his injury was not caused by an accident and did not arise out of and in the course of his employment. We agree.

"Injury and accident are separate concepts, and there must be an accident which produces the injury before an employee can be awarded compensation." *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 138, 620 S.E.2d 533, 536 (2005). "An accident under [The Act] has been defined as . . . 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected

consequences.' " *Pitillo*, 151 N.C. App. at 645, 566 S.E.2d at 811 (quoting *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999)). Similarly, our Supreme Court has defined an accident as "an unlooked for and untoward event which is not expected or designed by the injured employee. A result produced by a fortuitous cause. An unexpected or unforeseen event. An unexpected, unusual or undesigned occurrence." *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (internal quotation marks and citations omitted).

Here, Gentry's alleged failure to properly diagnose and treat Plaintiff cannot be described as an "accident" as contemplated by The Act. Timken employed Gentry as an on-site nurse to provide medical care to its employees. When Plaintiff sought and received medical care from Gentry, it was not "an unlooked for and untoward event which [was] not expected or designed by [Plaintiff]." *Id.* It is entirely foreseeable and expected that a sick or injured Timken employee will visit the company nurse to receive treatment. By way of analogy, if a janitor at WakeMed suffered a heart attack on the job and received negligent treatment from an on-site cardiologist, he would certainly be able to bring a medical malpractice claim in Superior Court. An employee seeking care from a medical professional at his place of work is not the type of occurrence that creates an injury by accident under The Act. Plaintiff's visit to the company nurse is not an instance that falls within the definition of accident promulgated by our Supreme Court.

Assuming *arguendo* this occurrence could be classified as such, we are nevertheless unpersuaded the injury arose out of Plaintiff's employment.[1] "Arising out of employment relates to the origin or cause of the accident. The controlling test of whether an injury arises out of the employment is whether the injury is a natural and probable consequence

1. The phrase "arising out of and in the course of employment" represents a single test of work connection. *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 630 S.E.2d 681 (2006). Nevertheless, "[T]he phrases 'arising out of' and 'in the course of' one's employment are not synonymous but rather are two separate and distinct elements[,] both of which a claimant must prove to bring a case within the Act." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). "The words 'in the course of [employment]' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 381, 752 S.E.2d 677, 681 (2013) (internal quotation marks and citations omitted). Plaintiff does not contest the fact that his injury occurred in the course of his employment, which is clear from the record. We need only determine whether the alleged injury by accident arose out of his employment.

of the nature of the employment." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 381, 752 S.E.2d 677, 680 (2013) (internal quotation marks and citations omitted). We have said an injury meets this definition "when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein." *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968).

Here, Plaintiff's alleged injury resulted from a failure to properly diagnose and treat the stroke he suffered on the job. That injury, although caused by a coworker, does not spring from his employment as a grinding machine operator for Timken because it is not a natural or probable consequence of the nature of Plaintiff's employment. Stated differently, when Plaintiff reported to work as a grinding machine operator he would not have considered being misdiagnosed or mistreated for a stroke by a medical professional as a possible consequence of that work.

In arguing that the Industrial Commission has exclusive jurisdiction over this action, Defendants point to our Supreme Court's decision in *Abernathy v. Consolidated Freightways Corp. of Delaware*, 321 N.C. 236, 362 S.E.2d 559 (1987). In *Abernathy*, an employee sued his coworkers for causing him to be injured by a brakeless tow motor, but his suit was dismissed by our Supreme Court when it concluded The Act "provides the exclusive remedy when an employee is injured in the course of his employment by the ordinary negligence of co-employees." *Id.* at 237, 362 S.E.2d at 560. Here, unlike in *Abernathy*, Plaintiff alleges his coworker is liable to him for breaching N.C.G.S. § 90-21.12, our statute establishing a special duty for medical professionals when rendering care. This case is further distinguishable from *Abernathy* because Plaintiff did not suffer an injury by accident arising out of his employment.

In sum, Plaintiff's claim does not fall under the exclusive jurisdiction of the Industrial Commission through The Act. Where an injury occurs in the course of one's employment but is not caused by an accident and does not arise out of that employment, that injury does not fall under The Act and the injured party may not be compensated thereunder. As both the Industrial Commission and trial court correctly concluded, Plaintiff's injuries are not compensable under The Act. Therefore, the Commission does not have exclusive jurisdiction over Plaintiff's claim, and the trial court did not err in denying Defendants' *Motion to Dismiss* for lack of subject matter jurisdiction.

CONCLUSION

The Industrial Commission does not have exclusive jurisdiction over Plaintiff's claim. The trial court did not err in asserting jurisdiction over this matter or in denying Defendants' *Motion to Dismiss*.

AFFIRMED.

Judges STROUD and DIETZ concur.

ANITA KATHLEEN PARKES, PLAINTIFF
v.
JAMES HOWARD HERMANN, DEFENDANT

No. COA18-888

Filed 21 May 2019

Medical Malpractice—proximate cause—loss of chance of a better medical outcome—summary judgment

In a medical malpractice case, the trial court properly granted summary judgment in favor of the physician after finding insufficient evidence of proximate cause where the evidence showed that, even if the physician had correctly diagnosed plaintiff's stroke and had administered the proper treatment, there would have been only a 40% chance of improving plaintiff's neurological condition. More importantly, North Carolina law does not recognize a "loss of chance" at a better outcome as a separate type of injury for which plaintiffs may recover in medical malpractice cases.

Judge BERGER concurring by separate opinion.

Appeal by Plaintiff from order entered 25 May 2018 by Judge Jesse B. Caldwell III in Lincoln County Superior Court. Heard in the Court of Appeals 28 March 2019.

Melrose Law, PLLC, by Mark R. Melrose and Adam R. Melrose, for the Plaintiff.

Roberts & Stevens, P.A., by Phillip T. Jackson and Elizabeth T. Dechant, for the Defendant.

DILLON Judge.

Plaintiff Anita Kathleen Parkes appeals from an order granting summary judgment on her medical malpractice claim in favor of Defendant James Howard Hermann ("Dr. Hermann"). We affirm the trial court's grant of summary judgment to Dr. Hermann as Ms. Parkes failed to show evidence of proximate cause.

I. Background

The evidence in the light most favorable to Ms. Parkes shows as follows:

Ms. Parkes exhibited signs of a stroke just after midnight on 24 August 2014. Her family transported her to the emergency room of a nearby hospital, arriving shortly before 2:00 A.M. The proper protocol where a patient presents herself for treatment within three hours of suffering a stroke is to administer Alteplase, a tissue plasminogen activator, (hereinafter "tPA"). Where this drug is administered within three hours of the onset of a stroke, a patient who would otherwise suffer lasting neurological effects has a 40% chance of an improved neurological outcome.

When Ms. Parkes arrived at the hospital, she was seen immediately by Dr. Hermann, who was the on-duty emergency physician. Dr. Hermann failed to properly diagnose that Ms. Parkes had suffered a stroke; and, accordingly, he did not administer tPA within the three-hour window. Ms. Parkes continues to suffer adverse neurological effects, such as diminished mobility, from her stroke.

Had Dr. Hermann properly diagnosed the stroke, the standard of care would have dictated that he administer tPA. If tPA had been administered, Ms. Parkes would have had a 40% chance of a better neurological outcome than the outcome that she, in fact, is experiencing.

Because tPA was not available at the local hospital where Ms. Parkes was seen, she would have needed to be transported to the nearest hospital where tPA could be administered. Thus, prompt diagnosis of the stroke was crucial to arrange tPA therapy within the three-hour period.

In April 2017, Ms. Parkes brought this medical malpractice negligence action against Dr. Hermann, claiming that her chance for an improved neurological outcome was diminished by Dr. Hermann's failure to diagnose her stroke and administer tPA. Dr. Hermann moved for summary judgment on the grounds that Ms. Parkes did not satisfy

the "proximate cause" element of her claim. Specifically, Dr. Hermann argues that Ms. Parkes failed to establish that she *more likely than not* (greater than 50% likelihood) would be better but for Dr. Hermann's negligent conduct.

After a hearing on the matter, the trial court entered summary judgment in favor of Dr. Hermann. Ms. Parkes timely appealed.

II. Analysis

We review an order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). To survive summary judgment in a medical malpractice action, the plaintiff must not only demonstrate that the doctor was negligent, but also that his "treatment proximately caused the injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978). All facts and evidence must be viewed "in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). To establish proximate cause, the plaintiff must show that the injury was more likely than not caused by the defendant's negligent conduct. *See White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988) ("Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery.").

In the present case, Ms. Parkes has suffered an injury; namely diminished neurological function. To be sure, her stroke was a proximate cause of this injury. Ms. Parkes filed this action, contending that Dr. Hermann's negligence was also a proximate cause of this injury. However, the evidence in the light most favorable to Ms. Parkes only shows that there is a 40% chance that Dr. Hermann's negligence[1] caused Ms. Parkes' injury. That is, this evidence shows that had Dr. Hermann properly diagnosed Ms. Parkes and had administered tPA, there was only a 40% chance that Ms. Parkes' condition would have improved. Therefore, we must conclude that the trial court correctly determined that Ms. Parkes failed to put forth evidence showing, more likely than not, that Dr. Hermann's negligence caused Ms. Parkes' current condition.

---

1. As we write this opinion based on the evidence viewed in the light most favorable to Ms. Parkes, our opinion should not be construed to resolve any factual issues in this case. *See Caldwell*, 288 N.C. at 378, 218 S.E.2d at 381. For instance, our opinion should not be construed as a conclusion that Dr. Hermann, in fact, acted negligently. We also recognize that tPA, like all drugs, has risks as well as potential benefits, but we assume for purposes of summary judgment that Ms. Parkes would have elected to receive tPA if offered and that tPA would have given Ms. Parkes a 40% chance of a better outcome.

Ms. Parkes argues, however, that she has suffered a *different* type of injury for which she is entitled to recovery; namely, her "loss of chance" of a better neurological outcome. Though Ms. Parkes would certainly put a high value on being able to live with better neurological function than she is currently experiencing, she had a less than 50% chance of this result when she arrived at the emergency room, no matter what kind of treatment she received from Dr. Hermann. But what she did have early that morning was a *40% chance* of a better neurological outcome had she been administered tPA, and this 40% chance *itself* certainly had some value to Ms. Parkes. The question presented is whether her loss of this *40% chance*, itself, is a type of injury for which Ms. Parkes can recover.

There is a split of authority around the country as to whether a patient may recover for the injury of the mere "loss of chance" of a better medical outcome proximately caused by a physician's negligence: Some states allow a plaintiff to recover for a "loss of chance" injury while others exclusively follow a traditional approach. *See Valadez v. Newstart, LLC*, 2008 Tenn. App. LEXIS 683, *10-16 (2008) (discussing the different approaches followed around the country).

Under the "traditional" approach, a plaintiff may not recover for the loss of a less than 50% chance of a healthier outcome. But, if the chance of recovery was over 50%, a plaintiff may recover for *the full value of* the healthier outcome itself that was lost by merely showing, more likely than not (greater than 50%), that a healthier outcome would have been achieved, but for the physician's negligence. *Id.* at *14.

We conclude that North Carolina has not departed from this traditional approach. As such, we must conclude that Ms. Parkes' "loss of chance" at a better result is not a separate type of injury for which she may recover in a medical malpractice negligence action. We note that neither party cites to any North Carolina case where such a claim has been recognized. Rather, our Supreme Court has sustained a nonsuit in a medical malpractice case where the plaintiff's expert merely testified that the plaintiff would have had a better chance of recovery had he received immediate medical attention, stating "[t]he rights of the parties cannot be determined upon chance." *Gower v. Davidian*, 212 N.C. 172, 176, 193 S.E. 28, 30 (1937). And our Court has expressly refused to adopt "loss of chance" as a separate cause of action in a negligence claim case. Specifically, we refused to recognize a claim for the mere increase in risk of a serious disease, stating that any change in our negligence law lies "within the purview of the legislature and not the courts[,]" quoting our Supreme Court:

> The excelsior cry for a better system in order to keep step with the new conditions and spirit of a more progressive age must be made to the Legislature, rather than to the courts.

Curl v. American Multimedia, Inc., 187 N.C. App. 649, 656-57, 654 S.E.2d 76, 81 (2007) (quoting *Henson v. Thomas*, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949)).

III. Conclusion

"Loss of chance" is not a recognized claim in North Carolina in medical malpractice negligence cases. We, therefore, affirm Judge Caldwell's order granting summary judgment for Dr. Hermann.

AFFIRMED.

Judge STROUD concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority.

"[R]ecognition of a new cause of action is a policy decision which falls within the province of the legislature." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656, 654 S.E.2d 76, 81 (2007) (quoting *Ipock v. Gilmore*, 85 N.C. App. 70, 73, 354 S.E.2d 315, 317 (1987)). Because "loss of chance" is not a cognizable cause of action in North Carolina, our analysis should begin and end there. Consideration of what the law ought to be is for the people to decide through their elected representatives. It is not the proper subject for judges at any level.

STATE v. ALLEN

[265 N.C. App. 480 (2019)]

STATE OF NORTH CAROLINA
v.
JULIEN ANTONIO ALLEN, DEFENDANT

No. COA18-1159

Filed 21 May 2019

1. Constitutional Law—Confrontation Clause—unavailability—forfeiture by wrongdoing

In a prosecution for robbery-related crimes, the trial court properly admitted a recorded statement by the defendant's girlfriend where it correctly determined that the girlfriend was unavailable for purposes of the Confrontation Clause and Rule of Evidence 804. The trial court's findings of fact demonstrated that the State used reasonable means and made a good faith effort to procure the girlfriend's presence at trial, and the State satisfied its burden of showing, by a preponderance of the evidence, that defendant forfeited his confrontation rights by making threatening phone calls to his girlfriend to deter her from testifying.

2. Evidence—evidence of gang membership—harmless error

At a trial for multiple crimes arising from a store robbery, the admission of testimony regarding defendant's gang affiliation was harmless where—even if the testimony had been inadmissible under Rules of Evidence 401 and 403—defendant failed to show a reasonable possibility of acquittal if the testimony had been excluded because there was overwhelming evidence of his guilt, including a co-conspirator's testimony and surveillance footage indicating defendant's participation in the robbery.

Appeal by defendant from judgments entered 29 March 2018 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 25 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Kathryn L. VandenBerg, for defendant.

ARROWOOD, Judge.

Julien Antonio Allen ("defendant") appeals from judgments entered upon his convictions for first degree murder, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit robbery with a dangerous weapon. For the following reasons, we find no error.

I. Background

On 10 January 2017, a Johnston County Grand Jury indicted defendant for first degree murder of Mr. Esmail Alshami ("Mr. Alshami"), robbery with a dangerous weapon from the person and presence of Mr. Alshami, assault with a deadly weapon with intent to kill inflicting serious injury of Mr. Ricky Lynch ("Mr. Lynch"), and conspiracy to commit the murder. The Grand Jury later entered a superseding indictment, replacing the aim of the conspiracy charge with conspiracy to commit robbery. The matter came on for trial on 19 March 2018 in Johnston County Superior Court, the Honorable Thomas H. Lock presiding. The State's evidence tends to show as follows.

Defendant and his friend Omari Smith ("Smith") robbed a Knightdale restaurant on 20 October 2016, with the help of an additional accomplice. They used gray bandanas, guns, and a clown mask to carry out the robbery. A week later, on 27 October 2016, defendant and Smith agreed to rob a Shop-N-Go variety store. Their friend Darius McCalston ("McCalston") also agreed to participate in the robbery.

The group met at Smith's grandmother's house, and got into defendant's girlfriend, Grecia Montes ("Montes")'s, mother's car. Defendant drove, Montes sat in the front passenger seat, and Smith and McCalston sat in the backseat. They arrived at the Shop-N-Go around 10:00 p.m., parking the car on the other side of the street, across from the store.

Defendant and Montes remained in the car while Smith and McCalston left to stand outside the store, armed with guns supplied by defendant. Their faces were covered with gray bandanas. Defendant kept watch, and communicated with Smith and McCalston by phone. At defendant's direction, Smith and McCalston began the robbery.

A store clerk, Mr. Alshami, stood behind the counter. Smith and McCalston demanded that Mr. Alshami fill a bag with money. Smith went behind the counter, holding out the bag for Mr. Alshami to fill, and grabbing cigars. McCalston told Mr. Alshami: "Make one more move, I'll shoot the shit out of you." McCalston then shot Mr. Alshami. He later told Smith that he shot Mr. Alshami because Mr. Alshami hit an alarm.

The other store clerk, Mr. Lynch, said, "Hey, what's going on in there?" Smith and McCalston fled. Smith ran out the backdoor, shooting behind him at Mr. Lynch as he made his way to Montes' mother's car. One of the shots hit Mr. Lynch in the abdomen. Once Smith and McCalston reached Montes' mother's car, defendant drove them to Montes' mother's house, where Smith and McCalston divided the money they stole during the course of the robbery.

Mr. Alshami died as a result of gunshot wounds to his neck and back. Mr. Lynch recovered after spending three weeks in the hospital.

One of defendant's housemates, Malik Rogers ("Rogers") later found gray and blue bandanas, a gun, and a clown mask in defendant's closet. He used the bandanas and clown mask to carry out a robbery on 1 November 2016. Although defendant did not participate in this robbery, the evidence tended to connect the masks from the other robberies to defendant. Smith and defendant again robbed a store on 9 December 2016, with another accomplice, Nathan Davis ("Davis).

On 29 March 2018, the jury found defendant guilty of all charges. The trial court sentenced defendant to life imprisonment without parole for first degree murder, 83 to 112 months for assault with a deadly weapon with intent to kill inflicting serious injury, and 29 to 47 months for conspiracy, all to be served consecutively. The trial court arrested judgment on the robbery charge.

Defendant appeals.

II. Discussion

Defendant argues the trial court erred by admitting into evidence: (1) a recorded statement given by Montes, and (2) gang-related evidence. We address each argument in turn.

A. Montes' Recorded Statement

[1] Montes did not attend defendant's trial. Nevertheless, after finding Montes was "unavailable" for purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2017) and the Confrontation Clause of the United States Constitution, and holding that defendant forfeited his constitutional right to confront her, the trial court admitted a recorded statement Montes made to law enforcement prior to trial. Defendant argues the trial court erred by admitting this statement because: (1) Montes was not "unavailable" for purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) and the Confrontation Clause, and (2) defendant did not forfeit his constitutional right to confront Montes. We disagree.

i. Unavailability

Rule 804(a) of the North Carolina Rules of Evidence lists the scenarios that permit a trial court to determine a declarant is "unavailable" to testify as a witness at trial. Here, the trial court determined Montes was unavailable pursuant to Rule 804(a)(5), which permits statements to be introduced at trial in lieu of live testimony if: (1) the declarant is unavailable as a witness, and (2) the statement qualifies as a circumstance listed in Rule 804(b). N.C. Gen. Stat. § 8C-1, Rule 804(b). The trial court determined Montes' recorded statement fell within the scope of both Rule 804(b)(3) and (5):

> (3) Statement Against Interest. - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> . . . .
>
> (5) Other Exceptions. - A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

N.C. Gen. Stat. § 8C-1, Rule 804(b).

In contrast, our courts have held that finding witnesses unavailable for the purposes of the Confrontation Clause requires a finding that "the prosecutorial authorities have made a good-faith effort to obtain [the declarant's] presence at trial." *State v. Clonts*, __ N.C. App. __, __, 802 S.E.2d 531, 544 (2017) (quoting *Barber v. Page*, 390 U.S. 719, 724-25, 20 L. Ed. 2d 255, 260 (1968)), *aff'd*, __ N.C. __, 813 S.E.2d 796 (2018).

Thus, in sum,

> [t]he trial court was required to make sufficient findings of fact, based upon competent evidence, in support of any ruling that the State had satisfied its burden of demonstrating that it had been unable to procure [the declarant's] attendance . . . by process or other reasonable means for the purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5), and that it had made a good-faith effort to obtain [her] presence at trial for Confrontation Clause purposes.

Id. at __, 802 S.E.2d at 545 (citation and internal quotation marks omitted).

To review a trial court's determination that a witness is unavailable, our Court considers "whether the trial court's findings of fact related to the witness' unavailability were supported by the evidence and, in turn, supported its conclusions of law." *Id.* at __, 802 S.E.2d at 545 (citations omitted). "The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case." *Id.* at __, 802 S.E.2d at 545 (quoting *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740-41 (1986)).

In the present case, Montes was arrested in connection with the crimes charged against defendant. Following her arrest, she cooperated with law enforcement and gave a statement about the robbery that tended to incriminate defendant. Montes agreed to appear in court and testify against defendant, but failed to appear. Her whereabouts were unknown to her family, bondsman, and the State. The State moved the trial court to allow her recorded statement into evidence on grounds that she was unavailable, and also that defendant forfeited his constitutional right to confrontation with regard to Montes due to his own wrongdoing.

The trial court heard the motion at an evidentiary hearing on 28 March 2018. The trial court found, in relevant part:

> 8. After Montes failed to appear, the State obtained recordings of the defendant's telephone calls from jail to his mother and grandmother. . . .
>
> 9. On 15 March 2018, the defendant made a recorded call to his mother. . . . [His mother] then connected Montes to the call so that it became a three-way call. During this call, the defendant made the following statements to Montes: "You know what the f***

you're supposed to be doing. You know what I'm talking about. You got time to do everything else, n*****." Montes responded to the defendant and said, "Now I have to testify against you, how do you think that makes me feel? You didn't take the plea."

10. Later that same day, the defendant placed a recorded call to his grandmother . . . [she] then connected Montes to this call. During this call, the defendant said to Montes: "You're thinking about your mother f****** self, n*****, lying, thinking of yourself. You're trying to save your own ass. You ain't doing a mother f****** thing, you are a selfish mother f*****. You're trying to blame it on me. What the f***** wrong with you?" Montes responded and asked, "What am I supposed to do?" The defendant replied: "Let me break it down, I'm not trying to save my neck to f*** someone else's life up. You're f****** stupid. You don't listen. You ain't doing a thing you're supposed to because you're out getting your nails done. The only thing on my shit is your lying ass because you are a selfish mother f*****. You're the mother f****** reason I'm in here right now while you're out getting your nails done. Who the f*** else know [sic]? At the end of the day, you might be home, but I've to deal with this shit you've put me in."

11. On 22 March 2018, the day before a cooperating co-defendant, Omari Smith, was scheduled to testify, the defendant placed a recorded call to an unknown recipient. . . . The defendant told the recipient to attend court the next day because Omari would be in court at 9:30 "lying his ass off," and the defendant told the recipient to "put it on Facebook."

12. On the morning of 23 March 2018, the court observed two young male individuals appear in the courtroom. These two males had not previously attended any part of the trial. After approximately one hour, the court ordered the bailiff to eject one of these males from the courtroom because of his disruptive behavior. Both males left the courtroom and never returned.

13. Omari Smith testified that the defendant called him prior to their arrests and threatened Smith's brother.

Smith further testified that he decided to testify against the defendant in part because of this threat.

. . . .

15. On 15 March 2018, the defendant's mother and grandmother . . . appeared at the residence of Montes' parents. Montes was not home. . . . [Defendant's mother and grandmother] had been to the residence on prior occasions . . . but this time they stayed longer than usual, waiting until Montes arrived home.

16. After Montes arrived home from work, [defendant's mother and grandmother] engaged in a hushed conversation with her. When [they] left, Montes' parents questioned her about the conversation. Montes said [they] had told her to "make the best choice that she had to make." Montes' mother told Montes that her decision had already been made and that she needed to go to court and testify.

17. Montes' parents have not seen or talked with Montes since Sunday, 18 March 2018, and have reported her missing to the Johnston County Sheriff's Office.

18. The net effect of the defendant's words and conduct, in particular his words and conduct directed towards [Montes], was to pressure and intimidate her into not appearing in court and testifying in this case.

19. On 26 March 2018, the State gave the defendant written notice under [N.C. Gen. Stat. §] 8C-1, Rule 804(b)(5) of its intent to introduce the recorded statement of Montes. The recorded statement had been provided to the defendant during discovery.

Based on these findings of fact, the trial court concluded Montes was "unavailable as a witness for the State within the definition of [N.C. Gen. Stat. §] 8C-1, Rule 804(a)(5)." Additionally, the trial court concluded:

3. The statement was at the time of its making so far contrary to Montes' penal interest that she reasonably would not have made it unless she believed it to be true, and corroborating circumstances clearly indicate the trustworthiness of the statement.

4. Montes' recorded statement is admissible under [N.C. Gen. Stat. §] 8C-1, Rule 804(b)(3) and (5).

5. The conduct of the defendant as described above constitutes a forfeiture of the defendant's rights under the Sixth Amendment to the United States Constitution and under Article I, Section 23 of the Constitution of North Carolina to confront and cross-examine [Montes].

Defendant argues the trial court did not properly find Montes unavailable under the North Carolina Rules of Evidence and the Confrontation Clause because the trial court failed to find the State made a good faith effort to obtain Montes' attendance at trial. We disagree. The trial court made sufficient findings of fact to demonstrate that the State utilized reasonable means and made a good faith effort to procure Montes' presence at trial.

The North Carolina Rules of Evidence require that a finding of unavailability be supported by evidence of process or other reasonable means, *Clonts*, __ N.C. App. at __, 802 S.E.2d at 545, whereas, "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber*, 390 U.S. at 724-25, 20 L. Ed. 2d at 260 (finding the State did not make a good faith effort to obtain a witness' presence at trial where the sole reason the witness was not present was because the State did not attempt to seek his presence).

Defendant refers us to *Clonts*, a case where our Court held the State did not make a good faith effort to obtain a witness' presence where the trial court made insufficient findings of fact related to a witness' unavailability where the trial court "did not address the option of continuing trial until [the witness] returned from [military] deployment, nor did it make any finding . . . the State made a good-faith effort to obtain [the witness'] presence at trial[,] much less any findings demonstrating what actions taken by the State could constitute good-faith efforts." *Clonts*, __ N.C. App. at __, 802 S.E.2d at 546 (citation and internal quotation marks omitted). The Court then noted that, assuming *arguendo* the findings were sufficient, the evidence was not sufficient to support a good faith effort to obtain the witness' presence where the State knew the witness was deployed, and only served a last minute subpoena, despite being provided with contact information with military personnel who were identified as the point of contact for the matter months prior. *Id.* at __, 802 S.E.2d at 546-47.

In contrast, here, the trial court found that the State delivered a subpoena for Montes to her lawyer, and Montes agreed to appear in court and testify against defendant. Unlike the findings in *Clonts*, these findings

support a conclusion both that the State utilized reasonable means and made a good faith effort to obtain the witness' presence at trial.

ii. Confrontation Rights

We now turn to defendant's argument that he did not forfeit his confrontation rights by wrongdoing. We disagree.

Once a witness has been shown to be unavailable, our Court has held that, to protect a defendant's right to confrontation, "[w]e must determine: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *Id.* at __, 802 S.E.2d at 551-52 (citation and internal quotation marks omitted). Our Court reviews for alleged violations of constitutional rights *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). In the instant case, the recorded statement at issue was given by an unavailable declarant and is testimonial in nature, but defendant did not have the opportunity to cross-examine the declarant. However, the trial court found that, nonetheless, defendant forfeited his confrontation rights as to Montes by wrongdoing.

"Under the doctrine of forfeiture by wrongdoing, 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.' " *State v. Weathers*, 219 N.C. App. 522, 524, 724 S.E.2d 114, 116 (2012) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 165 L. Ed. 2d 224, 244 (2006)), *cert. denied*, 366 N.C. 596, 743 S.E.2d 203 (2013). Pursuant to this doctrine,

> when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system.

Id. Although North Carolina courts have applied this doctrine, they have not yet taken a position on the standard necessary to demonstrate forfeiture by wrongdoing. *Id.* at 525, 724 S.E.2d at 116. Here, the trial court held the government to the preponderance of the evidence standard. The preponderance of the evidence standard is generally applied by federal courts applying Rule 804(b)(6) of the Federal Rules of Evidence, and tends to also be applied by state courts assessing forfeiture by wrongdoing. *See Davis*, 547 U.S. at 833, 165 L. Ed. 2d at 244. In accord with these courts, we hold the trial court correctly determined that the State was

required to establish forfeiture by wrongdoing pursuant to the preponderance of the evidence standard.

Furthermore, we hold the State met this burden. The record shows defendant made phone calls that the court could find evidenced his intent to intimidate Montes into not testifying. He also threatened another testifying witness, Smith. In addition, his mother and grandmother, who helped facilitate defendant's threatening calls to Montes, showed up at Montes' parents' house prior to trial to engage in a conversation with her about her testimony. Based on the trial court's findings of fact related to this evidence, the trial court properly found, by at least a preponderance of the evidence, that the net effect of defendant's conduct was to pressure and intimidate Montes into not appearing in court and testifying in this case. Accordingly, the trial court properly concluded defendant forfeited his confrontation rights by wrongdoing.

B. Evidence of Gang Affiliation

[2] Next, defendant argues the trial court erred by admitting irrelevant and prejudicial evidence of gang affiliation, including: (1) Smith's testimony that he and defendant were in a gang together, (2) Smith's testimony about his and defendant's ranking in the gang, (3) Davis' testimony that Smith and defendant were members of the Crip gang, and (4) Rogers' testimony that Smith and defendant were members of the Crip gang and that when he used defendant's masks during a robbery, he and his accomplices did so to "act like [they were] Crip."

"North Carolina courts have long held that membership in an organization may only be admitted if relevant to the defendant's guilt." *State v. Hinton*, 226 N.C. App. 108, 113, 738 S.E.2d 241, 246 (2013) (citations omitted). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). "Relevant evidence may also be excluded if 'its probative value is substantially outweighed by the danger of unfair prejudice.' " *Hinton*, 226 N.C. App. at 113, 738 S.E.2d at 246 (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (2017)). The "admission of gang-related testimony tends to be prejudicial[.]" *Id.*

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the

> existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and internal quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 15A-1443 (2017), it is the defendant's burden to prove the testimony was erroneously admitted and he was prejudiced by the erroneous admission. "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Moses*, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987)).

Here, assuming *arguendo* that the admission of this evidence was error, defendant has not shown that a different result likely would have ensued had the evidence been excluded because there was overwhelming evidence of defendant's guilt. Smith, a co-conspirator, and Rogers both testified that defendant participated in the robbery of the Shop-N-Go. Rogers' testimony also tended to tie the bandanas used in the Shop-N-Go robbery to defendant. Similarly, Montes' statement to law enforcement averred that she was present and witnessed defendant participate in the Shop-N-Go robbery. Additionally, the jury was shown surveillance video taken by cameras at the Shop-N-Go on the night in question, which tended to be consistent with Smith's testimony, Montes' statement, and the motive and planning shown by the other robberies that Smith and Davis testified defendant committed.

In view of all of this evidence, we hold that defendant failed to show that there was a reasonable probability that defendant would have been acquitted if the gang references made during Smith, Roger, and Davis' testimony had not been admitted into evidence.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges INMAN and YOUNG concur.

STATE v. CAPPS

[265 N.C. App. 491 (2019)]

STATE OF NORTH CAROLINA
v.
BEN LEE CAPPS

No. COA18-386

Filed 21 May 2019

Jurisdiction—superior court—section 15A-922—amendment to charging instrument—misdemeanor statement of charges—timeliness

The superior court lacked jurisdiction to proceed on charges for misdemeanor larceny and injury to personal property where the prosecutor amended the original charging instrument (the arrest warrant), after defendant was convicted in district court, by filing a misdemeanor statement of charges. While section 15A-922 permits amendment of a charging instrument under limited circumstances, since none of those applied here, the State's amendment of one charging instrument by filing a different type after arraignment in district court rendered its misdemeanor statement of charges untimely. The judgment was vacated and the matter remanded for re-sentencing on defendant's remaining conviction (for reckless driving to endanger).

Judge BERGER dissenting.

Appeal by defendant from judgments entered 24 October 2017 by Judge Stanley L. Allen in McDowell County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Associate Attorney General Vinston Walton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Ben Lee Capps ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of misdemeanor larceny, injury to personal property, and reckless driving to endanger. However, the trial court lacked jurisdiction to try Defendant on offenses alleged in the misdemeanor statement of charges. Thus, we vacate the judgment

stemming from the charges alleged in the misdemeanor statement of charges and remand to the trial court to resentence Defendant for his remaining conviction.

I. Background

On 19 April 2016, a McDowell County magistrate issued arrest warrants charging Defendant with misdemeanor larceny and injury to personal property in file number 16 CRS 50513 and reckless driving to endanger in 16 CRS 50514. Defendant pleaded guilty to the charges in district court on 24 August 2016. He was sentenced to time served and ordered to pay restitution of $25.00 to Love's Truck Stop. On 2 September 2016, Defendant filed notice of appeal to superior court for a trial *de novo* pursuant to N.C. Gen. Stat. § 15A-1431.

Defendant was tried in superior court on 23 October 2017 before the Honorable Stanley L. Allen. Prior to jury selection, the prosecutor moved to amend the charges in 16 CRS 50513 with a misdemeanor statement of charges, as follows:

> THE COURT: The State has a motion to amend.
>
> [PROSECUTOR]: Yes, sir. I have drafted it on a misdemeanor statement of charges. The history of this case briefly is that this was a misdemeanor which was pled guilty to in [district] court based on the charging language, and it was a time-served judgment, and so it was not scrutinized closely. The charging language alleges that the personal property and the property stolen in the larceny are the property—Love's Truck Stop. I am moving to amend the owner of that property to Love's Travel Stop & Country Stores, Incorporated. May I approach?
>
> THE COURT: Yes, sir. What says the defendant?
>
> [DEFENSE COUNSEL]: No objection, Your Honor.

The trial court granted the State's motion and a misdemeanor statement of charges was signed and entered that day. The arrest warrant identified the owner of the stolen property as "Loves Truck Stop," while the misdemeanor statement of charges identified the owner as "Love's Travel Stops & Country Stores, Inc." In 16 CRS 50513, the State proceeded upon the statement of charges signed by the prosecutor, rather than the arrest warrant upon which Defendant was convicted in district court and from which he appealed to superior court.

At trial, the State presented evidence that Defendant drove to Love's Truck Stop on 19 April 2016 and stopped his vehicle at the store's air pump. While arguing loudly with a passenger, Defendant exited his vehicle and attempted to put air in the rear tire. He then began swinging the air hose at the passenger-side window and telling the passenger "to be quiet." Defendant then cut off the end of the air hose, dragged the passenger from the vehicle, attempted to strike her with the severed hose, and placed the section of hose inside of his car.

Deputy Donald Cline, an off-duty member of the Swain County Sheriff's Office, was at the truck stop refueling his vehicle, and he walked toward the disturbance. As Defendant began to berate an attendant, Deputy Cline approached Defendant, displayed his badge, and lifted his shirt to reveal his service weapon. With his passenger lying on the ground, Defendant reentered his vehicle and drove around the store at a high speed while "burning" his tires, leaving a continuous tread mark on the pavement. Defendant then drove through an intersection, where he narrowly passed between a tractor-trailer and a stopped car, ran a red light, and headed "up the interstate at a high rate of speed."

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to 120 days in the custody of the North Carolina Division of Adult Correction for misdemeanor larceny and ordered him to pay $25.00 in restitution, together with $1,170.00 in court-appointed counsel fees. The court consolidated the reckless driving and injury to personal property convictions for judgment and imposed a 45-day sentence to run consecutively with Defendant's larceny sentence. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, Defendant contends that the superior court lacked jurisdiction to try him for misdemeanor larceny and injury to personal property because the State proceeded upon an untimely misdemeanor statement of charges in 16 CRS 50513 rather than the arrest warrant upon which Defendant was convicted in district court. We agree.

A trial court's subject matter jurisdiction is a question of law reviewed *de novo* on appeal. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012). A misdemeanor statement of charges is one of several charging instruments that may serve as a pleading in North Carolina. N.C. Gen. Stat. § 15A-921(5) (2017). Typically, a "citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court,

unless the prosecutor files a statement of charges[.]" *Id.* § 15A-922(a). "A statement of charges is a criminal pleading which charges a misdemeanor." *Id.* § 15A-922(b)(1). "When a statement of charges is filed it supersedes all previous pleadings of the State and constitutes the pleading of the State." *Id.* § 15A-922(a).

The timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor can file a statement of charges. "The prosecutor may file a statement of charges upon his own determination *at any time prior to arraignment in the district court*." *Id.* § 15A-922(d) (emphasis added). "After arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and (2) the trial court rules that the pleading is in fact insufficient." *State v. Wall*, 235 N.C. App. 196, 199, 760 S.E.2d 386, 388 (2014) (citing N.C. Gen. Stat. § 15A-922(e)). If the trial court allows the State to file a statement of charges at or after arraignment, the new statement of charges "may not change the nature of the offense." N.C. Gen. Stat. § 15A-922(e). "A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged." *Id.* § 15A-922(f).

Although N.C. Gen. Stat. § 15A-922(f) permits a misdemeanor charging instrument to be amended at any time, a charging instrument may be amended by a misdemeanor statement of charges only under limited circumstances. In *Wall*, the defendant was charged by magistrate's order with resisting a public officer and giving false information to a public officer. *Wall*, 235 N.C. App. at 198, 760 S.E.2d at 387. Following his conviction in district court, the defendant appealed to superior court for a trial *de novo*. *Id.* The State filed a misdemeanor statement of charges in superior court on which the defendant was tried and found guilty. *Id.* This Court vacated the judgment, holding that the superior court "lacked legal authority and, therefore, was without subject matter jurisdiction to try [the] defendant on the offense alleged in the misdemeanor statement of charges." *Id.* at 197, 760 S.E.2d at 386. We explained:

> While subsection (f) allows the charging instrument to be amended prior to or after a final judgment is entered, *this does not grant the State authority to change the form of the charging instrument; i.e., the State cannot "amend" a magistrate's order by filing a misdemeanor statement of charges*. Doing so would change the nature of the original pleading entirely. Accordingly, the State has a limited

> window in which it may file a statement of charges on its own accord, and that is prior to arraignment.

Id. at 199, 760 S.E.2d at 388 (emphasis added).

Just as the magistrate's order in *Wall* could not be "amended" by filing a misdemeanor statement of charges, here, the arrest warrant could not be "amended" by filing a misdemeanor statement of charges, unless either (1) the prosecutor filed the statement of charges prior to Defendant's arraignment in district court, N.C. Gen. Stat. § 15A-922(d); or (2) Defendant objected to the warrant's sufficiency as a pleading, and the trial court agreed that the warrant was insufficient. *Id.* § 15A-922(e). Neither of these exceptions apply in the present case. The statement of charges was untimely and therefore unauthorized. *Wall*, 235 N.C. App. at 200, 760 S.E.2d at 388. "Thus, the superior court had no jurisdiction to try [D]efendant for the new offense alleged in the statement of charges." *Id.*; *see also State v. Killian*, 61 N.C. App. 155, 157-58, 300 S.E.2d 257, 259 (1983) (vacating judgment because the State filed a misdemeanor statement of charges alleging a separate statutory violation than that charged by the warrant, but reasoning that even if the statement of charges had alleged the same offense, "it would have been untimely and thereby without legal authorization").

In the instant case, the State could have amended the warrant "at any time prior to or after final judgment [so long as] the amendment d[id] not change the nature of the offense charged." N.C. Gen. Stat. § 15A-922(f); *see also State v. Clements*, 51 N.C. App. 113, 115-17, 275 S.E.2d 222, 224-25 (1981) (allowing the State to amend the arrest warrant at the close of the State's evidence because the amendment did not change the nature of the charged offense). However, this Court's holding in *Wall*, applying the plain language of N.C. Gen. Stat. § 15A-922, dictates that the State may not amend a charging instrument in superior court by filing a misdemeanor statement of charges unless the defendant objects to the sufficiency of the charging instrument and the trial court rules that the pleading is in fact insufficient. *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. The only fact distinguishing this case from *Wall* is the nature of the original charging instrument. The defendant in *Wall* was charged upon a magistrate's order, *id.* at 198, 760 S.E.2d at 387, whereas here, Defendant was charged upon an arrest warrant. In neither instance did the defendant object to the sufficiency of the charging instrument. *Id.* at 200, 760 S.E.2d at 388. Nor is it of any consequence that Defendant failed to object to the statement of charges before the superior court. "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to . . . object to the jurisdiction is immaterial." *State v. Collins*, 245 N.C. App. 478, 485, 783 S.E.2d 9, 14 (2016).

The State argues in this case that "the prosecutor did not file a statement of charges on his own accord at superior court . . . . [but] moved to amend the original warrant, and the statement of charges was entered as an amendment to the warrant." That argument contradicts the statute and this Court's holding in *Wall*. The plain language of the statute clearly provides that "[w]hen a statement of charges is filed it supersedes all previous pleadings of the State and constitutes the pleading of the State." N.C. Gen. Stat. § 15A-922(a). *Wall* explains that although section 15A-922(f) permits the State to amend the charging instrument before or after final judgment is entered, "this does not grant the State authority to change *the form* of the charging instrument; i.e., the State cannot 'amend' a[n] [arrest warrant] by filing a misdemeanor statement of charges. Doing so would change the nature of the original pleading entirely." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388 (emphasis added).

In the instant case, the State informed the trial court that it had "a motion to amend [the arrest warrant]" that was "drafted . . . on a misdemeanor statement of charges." While the State may assert that it merely intended to amend the arrest warrant, the newly filed misdemeanor statement of charges superseded the arrest warrant and became the pleading of the State. *See* N.C. Gen. Stat. § 15A-922(a). This Court's case law does not allow the State, after arraignment in district court, to amend one charging instrument by filing a different type of charging instrument; indeed, it forbids it. *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. This Court is bound by that precedent. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Additionally, this Court is "an error-correcting body, not a policy-making or law-making one. We lack the authority to change the law . . . ." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 739, 796 S.E.2d 529, 533 (citation omitted), *disc. review denied*, 370 N.C. 66, 803 S.E.2d 626 (2017).

In that the State filed an untimely and unauthorized misdemeanor statement of charges, the trial court was without subject matter jurisdiction to try Defendant on the charges therein. Therefore, the judgment entered on those charges is void and must be vacated.

III. Conclusion

In that the prosecutor proceeded on an untimely misdemeanor statement of charges in 16 CRS 50153, the trial court lacked jurisdiction to try Defendant on the charges listed. Accordingly, we vacate Defendant's

convictions for misdemeanor larceny and injury to personal property. We remand the case for the court to resentence Defendant on his conviction for reckless driving to endanger in 16 CRS 50154.

VACATED IN PART; REMANDED FOR RESENTENCING IN PART.

Judge HAMPSON concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

The majority relies on *State v. Wall*, 235 N.C. App. 196, 760 S.E.2d 386 (2014) in reaching its decision. However, the majority has failed to discuss the plain language of N.C. Gen. Stat. § 15A-922(d) and *Wall* regarding the meaning of the phrase "upon [the prosecutor's] determination." Moreover, the majority and *Wall* incorrectly conclude that the State is prohibited from using a misdemeanor statement of charges to change the nature of the original pleading. Therefore, I respectfully dissent.[1]

"A statement of charges is a criminal pleading which charges a misdemeanor." N.C. Gen. Stat. § 15A-922 (b)(1) (2017); *see also* N.C. Gen. Stat. § 15A-921 (2017). Criminal pleadings must comply with the relevant requirements of N.C. Gen. Stat. § 15A-924. In addition, Section 15A-922 imposes as a jurisdictional requirement that a misdemeanor statement of charges "must be signed by the prosecutor who files it." N.C. Gen. Stat. § 15A-922 (b)(1).

Defendant does not argue that the misdemeanor statement of charges here fails in any way under Section 15A-924, or that the pleading was not signed by the prosecutor. Instead, Defendant argues for the first time on appeal that the filing of the misdemeanor statement of charges post-district court arraignment caused the superior court to be divested of jurisdiction.

Section 15A-922 states that a "prosecutor may file a statement of charges *upon his own determination* at any time prior to arraignment in the district court. It may charge the same offenses as the . . . warrant . . .

1. This panel is bound by *State v. Wall* pursuant to *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent . . . ."). "Our panel is following [*Wall*], as we should. However, I write separately to dissent because" the majority and a portion of *Wall* are incorrect. *Watson v. Joyner-Watson*, ___ N.C. App. ___, ___, 823 S.E.2d 122, 126, (2018) *Dillon, J., dissenting.*

or additional or different offenses." N.C. Gen. Stat. § 15A-922(d) (2017) (emphasis added). This section does in fact impose a limitation on the timing of a prosecutor's filing of a misdemeanor statement of charges when filed "upon his own determination." *Id.*

Section 15A-922(e) allows a defendant to file a motion objecting to the sufficiency of certain criminal pleadings. The motion may be filed in district court or upon trial de novo in superior court. If the trial court determines such pleadings are "insufficient, the prosecutor may file a statement of charges, but a statement of charges . . . may not change the nature of the offense." N.C. Gen. Stat. § 15A-922(e) (2017). Defendant here filed no such motion.

The majority and *Wall*, contend that "[a]fter arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and (2) the trial court rules that the pleading is in fact insufficient." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388 (citation omitted). The majority here goes further in limiting the State's use of misdemeanor statements of charges by contending that "[t]he timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor can file a statement of charges." This is correct *only* for statements of charges filed by a prosecutor "upon his own determination" or when a defendant files a motion contesting an insufficient criminal pleading. However, these limitations are not as sweeping as the majority or *Wall* contend.

In *State v. Killian*, 61 N.C. App. 155, 300 S.E.2d 257 (1983), the defendant was charged by warrant with a misdemeanor offense and convicted in district court. The defendant appealed his conviction. When the case came on for trial de novo in superior court, "the District Attorney issued a misdemeanor statement of charges." *Id.* at 156, 300 S.E.2d at 258 (1983) (quotation marks omitted). There was no motion by the defendant in the record objecting to the original warrant pursuant to Section 15A-922(e), and no indication that the parties had agreed to the filing of the misdemeanor statement of charges. *Id.* at 157, 300 S.E.2d at 259. This Court reversed the defendant's conviction because the misdemeanor statement of charges filed by the prosecutor alleged a different offense than that alleged in the original warrant. The Court also stated that even if the statement of charges alleged the same charge as the original warrant, the new pleading would have been untimely because "[t]he statement of charges was filed by the prosecutor '*upon his own determination*'; and *that* could only be done 'prior to arraignment in the district court,' not upon trial de novo on appeal to superior court . . . ." *Id.* at 157, 300 S.E.2d at 259 (emphasis added).

Similarly, in *State v. Wall*, the defendant was tried and convicted for a misdemeanor in district court. The State filed a misdemeanor statement of charges after the case was appealed for trial de novo in superior court. This Court noted that "the State has a limited window in which it may file a statement of charges *on its own accord*, and that is prior to arraignment." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388 (emphasis added).

Both *Killian* and *Wall* recognize that Section 922(d) imposes a procedural limitation on the filing of a statement of charges *on the prosecutor's own determination or accord*. The prosecutor has discretion to file a misdemeanor statement of charges on his own accord at any time prior to arraignment in district court. A statement of charges filed at this time can correct a prior criminal pleading or may charge new offenses.

However, neither the statute nor *Wall* or *Killian*, preclude a prosecutor's post-district court arraignment use of statements of charges when the prosecutor and the parties agree. Here, there is no question that the statement of charges was filed post-district court arraignment. The relevant inquiry then is whether or not the statement of charges was filed on the prosecutor's own determination.

The State made an oral motion to amend the warrant in superior court using a misdemeanor statement of charges. Not only was the State's request to use a statement of charges to correct a perceived defect in the warrant consented to by Defendant, it was allowed by the trial court as set forth in the following exchange:

> THE COURT: The State has a motion to amend[?]
>
> [PROSECUTOR]: Yes, sir. I have drafted it on a misdemeanor statement of charges. The history of this case briefly is that this was a misdemeanor which was pled guilty to in [district] court based on the charging language, and it was a time-served judgment, and so it was not scrutinized closely. The charging language alleges that the personal property and the property stolen in the larceny are the property – Love's Truck Stop. I am moving to amend the owner of that property to Love's Travel Stop & Country Stores, Incorporated. May I approach?
>
> THE COURT: Yes, sir. What says the defendant?
>
> [DEFENSE COUNSEL]: No objection, Your Honor.

Based upon this exchange between the parties and the court, the statement of charges was not filed upon the prosecutor's own determination or accord, and thus, not subject to the procedural limitation in Section 15A-922(d). Rather, the misdemeanor statement of charges was a new pleading filed with consent of all parties and permission of the Court because "there [was] some problem with the original process as a pleading," N.C. Gen. Stat. ch. 15A, art. 49 official commentary (2015). The majority has declined to discuss the wording of the statute, or the intent of the Legislature as set forth in the Official Commentary.

Therefore, because the statement of charges was not filed upon the prosecutor's own determination, the criminal pleading only had to meet the requirements set forth in Section 15A-924 and be signed by the prosecutor to satisfy jurisdictional concerns. Again, Defendant did not take issue with the sufficiency of the criminal pleading.

In addition, the majority and *Wall* incorrectly state that a misdemeanor statement of charges may not be filed when it "change[s] the form of the charging instrument, i.e., the State cannot 'amend' a magistrate's order by filing a misdemeanor statement of charges." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. The majority and *Wall* incorrectly view the filing of a statement of charges as an amendment to a criminal pleading when it is not. A statement of charges is a new criminal pleading, not an amendment to a prior criminal pleading.

The Official Commentary to Article 49 notes that

> The "statement of charges" is new. Being able to use the warrant as the pleading has worked well in this State, and saved much solicitorial manpower as compared to jurisdictions which require the drafting of a new misdemeanor pleading in each instance. *It was felt that there is some loss in trying to "amend" the warrant, and sometimes issue a new warrant, when what is desired is a correct statement of the charges--a proper pleading.* . . . [T]he "statement of charges" is created, as a new pleading, to be used when there is some problem with the original process as a pleading. As such it takes the place of amending the warrant (or amending other process which may also be used as the pleading). When filed prior to arraignment, it also may charge additional crimes. *That simple idea requires some complexity for statement in statutory form, but that is the underlying idea in § 15A-922. It should be relatively easy to prepare a statement of charges; a form should be sufficient in many cases.*

N.C. Gen. Stat. ch. 15A, art. 49 official commentary. (emphasis added). When read together, Section 15A-922 and the Official Commentary make it clear that a misdemeanor statement of charges was, contrary to *Wall*, intended to "change the form of the charging instrument" *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388.

Here, the State could have cured the defect in the warrant by amendment or by filing a statement of charges. *See* N.C. Gen. Stat. § 15-24.1 (2017) and § 15A-922(f) (2017). It is nonsensical that a trial court would be divested of jurisdiction by the filing of a statement of charges when an oral motion would have accomplished the same practical result: correcting the pleading.

Nevertheless, the majority and *Wall* incorrectly view Section 15A-922 as somehow prohibiting the use of a statement of charges to correct criminal pleadings when there is no such prohibition in the statute or the Official Commentary. In fact, the use of the misdemeanor statement of charges here was as the Legislature intended. N.C. Gen. Stat. § 15A-922(a); *see also* N.C. Gen. Stat. ch. 15A, art. 49 official commentary.

Because the filing of the statement of charges, with consent of Defendant and permission of the trial court, merely corrected a defect in a pleading, the trial court did not err.

STATE OF NORTH CAROLINA
v.
DAVID LEROY CARVER

No. COA18-935

Filed 21 May 2019

Search and Seizure—warrantless stop—reasonable suspicion—anonymous tip—reliability—corroboration

In a prosecution for driving while impaired, the arresting officer lacked a reasonable suspicion of criminal activity to conduct a warrantless stop of a truck—in which defendant was a passenger—based on an anonymous tip about a truck attempting to pull a drunk driver and his car out of a ditch. The tip lacked any indicia of reliability because it did not contain detailed descriptions of the car, the truck, or the driver, and the officer could not corroborate the tip where all he observed at the scene of the stop was a truck driving normally on the highway.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 23 April 2018 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 9 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Leslie S. Robinson for defendant-appellant.

TYSON, Judge.

David Leroy Carver ("Defendant") appeals from an order denying his motion to suppress. We reverse and remand.

I. Background

Beaufort County Sheriff's Deputy Dominic Franks received a dispatch call, which had originated from an anonymous tipster, a little before 11:00 p.m. on 8 January 2016. Deputy Franks was advised of a vehicle being located in a ditch on Woodstock Road, possibly with a "drunk driver, someone intoxicated," and that "a truck was attempting – getting ready to pull them out." Deputy Franks received no information concerning the description of the car, the truck, or the driver. There was also no information regarding the caller or at what time the call was received.

When Deputy Franks arrived at the rural location approximately ten minutes later, he noticed a white Cadillac "catty-cornered" or "partially in" someone's driveway at an angle. The vehicle had mud on the driver's side, and Deputy Franks opined that from "gouges in the side of the road . . . it appeared the vehicle had ran off the road." Deputy Franks did not stop at the vehicle to determine ownership and kept driving, though he testified he did not observe anyone in or around the vehicle as he passed.

As Deputy Franks continued driving past, he observed a truck "a couple of hundred feet" from where the Cadillac was parked, traveling away from his location. Deputy Franks testified he followed the truck to check its license plate. When he caught up from behind, he estimated the truck was traveling thirty-five to forty miles an hour, approximately fifteen to twenty miles below the posted 55 m.p.h. speed limit. Deputy Franks testified the truck was the only truck on the highway and "it was big enough to pull the car out." He did not see any chains, straps,

or other apparatus that would indicate that the truck had just pulled a vehicle out of a ditch.

Deputy Franks' sole reason to initiate the traffic stop was "due to what was called out from communications." The truck promptly came to a stop on the highway. The truck was being driven by a Mr. Griekspoor. Defendant was observed sitting in the passenger seat. Deputy Franks explained to Mr. Griekspoor that there was a report of a truck attempting to pull a vehicle out of a ditch. Mr. Griekspoor told Deputy Franks that he had pulled Defendant's car out of the ditch, was giving him a ride home, and he was "trying to help out a friend."

Deputy Franks observed that Defendant's legs were "covered in mud" from "half his thighs down." Defendant did not answer Deputy Franks' question of why he was so muddy. Deputy Franks' supervisor, Corporal Sheppard, arrived upon the scene as Deputy Franks was collecting Mr. Griekspoor's driver's license and registration.

Deputy Franks filled his supervisor in on the situation. Corporal Sheppard went to the passenger side to talk with Defendant, a "routine practice" according to Corporal Sheppard. Deputy Franks took Mr. Griekspoor's documents back to his patrol car to get information from communications on the license and registration and found no wants or warrants outstanding. He returned Mr. Griekspoor's documents while Corporal Sheppard was speaking with Defendant.

Corporal Sheppard asked Defendant to open the door and testified he noticed "a moderate odor of alcohol" from the passenger area. Defendant exited the truck at the officer's request. Corporal Sheppard stated he "continue[d] smelling the alcohol coming from [Defendant]," and observed Defendant was "unsteady on his feet."

Corporal Sheppard instructed Defendant to perform the Horizontal Gaze Nystagmus test. Corporal Sheppard purportedly detected all of the six clues from the test. By the time the Highway Patrol arrived to "process" Defendant ten to fifteen minutes later, he had been detained "based on [Corporal Sheppard's] suspicion of DWI." Defendant was given a Breathalyzer test by Highway Patrol Trooper Peele, with a result of 0.08. Defendant was charged with driving while impaired.

Defendant filed a motion to suppress evidence. The district court denied Defendant's motion, found him guilty of impaired driving, and sentenced him to sixty days imprisonment, which was suspended for twelve months of unsupervised probation. Defendant appealed to the superior court, where he filed another motion to suppress

evidence. After a hearing, the superior court entered an order denying Defendant's motion.

Defendant preserved his right to appeal the denial of his motion to suppress and entered a plea of guilty to impaired driving. The superior court sentenced Defendant to thirty days imprisonment, which was suspended for six months of unsupervised probation. Defendant gave oral notice of appeal.

II. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the deputy's observations of the scene and an anonymous tip were insufficient to defeat Defendant's motion to suppress. Defendant also argues the trial court erred by finding (1) there were "little artificial lights" in the general area; (2) there were gouges in the dirt shoulder of the road leading to the ditch in close proximity to the Defendant's car; and, (3) the deputy did not stop at the white car because he observed a truck going in the same direction he was.

IV. Standard of Review

On review of a denial of a motion to suppress, this Court is limited to the determination of "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Rose*, 170 N.C. App. 284, 287-88, 612 S.E.2d 336, 338-39 (2005) (citations and quotation marks omitted).

V. Investigatory Stop

"The Fourth Amendment protects individuals against unreasonable searches and seizures. The North Carolina Constitution provides similar protection." *State v. Hernandez*, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (citations and quotation marks omitted).

"[B]rief investigatory detentions such as those involved in the stopping of a vehicle" are considered seizures of the person and subject to Fourth Amendment protections. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citation omitted).

> The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has a particularized

> and objective basis for suspecting the particular person stopped of criminal activity. The reasonable suspicion necessary to justify such a stop is dependent upon both the content of information possessed by police and its degree of reliability. The standard takes into account the totality of the circumstances—the whole picture. Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.

Navarette v. California, 572 U.S. 393, 396-97, __ L. Ed. 2d __, __ (2014) (citations and quotation marks omitted).

"An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. To determine whether this reasonable suspicion exists, a court must consider the totality of the circumstances." *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297-98 (2001) (citations and internal quotation marks omitted). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* at 98, 555 S.E.2d at 298 (quoting *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70).

> It is well established that [a]n anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability. Even if a tip lacks sufficient indicia of reliability, it may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration. In sum, to provide the justification for a warrantless stop, an anonymous tip must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made.

State v. Veal, 234 N.C. App. 570, 577, 760 S.E.2d 43, 48 (2014) (internal citations and quotation marks omitted).

The State correctly concedes the anonymous tip in and of itself likely fails to provide sufficient reliability to justify a stop. *See Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000). The anonymous tip provided no description of either the car or the truck or how many people were involved. There is no indication of when the call came in or when the anonymous tipster witnessed the car in the ditch with a truck attempting to pull it out. However, the State argues since "nearly every

aspect of the tip was corroborated by the officer," the deputy had sufficient reasonable suspicion to stop the truck. We disagree.

The State asserts the facts in this case are comparable to *State v. Watkins*. In *Watkins*, an officer was informed of a suspicious vehicle behind the Virginia Carolina Well Drilling Company from a tip provided by an anonymous caller around 3:00 a.m. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. The officer did not know the description of the "suspicious vehicle," but he did know that the business was normally closed at that time. *Id.* As he investigated, the officer saw a vehicle driving away. *Id.* at 440, 446 S.E.2d at 69. The officer followed, turning on his blue lights and stopping the car "for the purpose of continuing his [suspicious vehicle] investigation and not because of anything he observed about the defendant's driving." *Id.* at 440-41, 446 S.E.2d at 69.

Our Supreme Court upheld the stop, holding that the officer had reasonable suspicion. "All of the facts, and the reasonable inferences from those facts, known to the officer when he decided to make the investigatory stop, would lead to a reasonably cautious law enforcement officer to suspect that criminal activity was afoot." *Id.* at 443, 446 S.E.2d at 70. "[C]onsidered as a whole and from the point of view of a reasonably cautious officer on the scene, the officer had a reasonable suspicion to detain defendant for a brief investigatory stop." *Id.* at 443, 446 S.E.2d at 71.

Unlike in *Watkins*, the facts and inferences drawn from these facts are insufficient for a reasonable officer to suspect criminal activity had occurred. When Deputy Franks passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or had been able to pull, a car out of a ditch. There were no chains or other apparatuses visible to the deputy. Deputy Franks could not see how many people were in the truck prior to the stop. He testified the truck was not operating in violation of the law. He believed it was a suspicious vehicle merely because of the fact it was on the highway.

Subsequent opinions from this Court are more applicable to the facts in this case. In *State v. Peele*, the officer responded to a call describing a burgundy pickup truck being driven recklessly by a possible intoxicated driver "headed towards the Holiday Inn intersection." 196 N.C. App. 668, 669, 675 S.E.2d 682, 684 (2009). The officer arrived on the scene "within a second," saw and followed a burgundy truck for about a tenth of a mile, observed the truck "weave within his lane once," and pulled the truck over. *Id.* This Court held that the officer lacked reasonable suspicion because "all we have is a tip with no indicia of reliability, no

corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." *Id.* at 674, 675 S.E.2d at 687 (citation and quotation marks omitted).

The Court in *Peele* relies on *State v. McArn*, where this Court found an anonymous tip describing a specific car at a specific location was insufficient to provide the officer with reasonable suspicion:

> [T]he fact that the anonymous tipster provided the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the vehicle the tipster referenced. It has not gone unnoticed by this Court, however, that the tipster never identified or in any way described an individual. Therefore, the tip upon which Officer Hall relied did not possess the indicia of reliability necessary to provide reasonable suspicion to make an investigatory stop. The anonymous tipster in no way predicted defendant's actions. The police were thus unable to test the tipster's knowledge or credibility. Moreover, the tipster failed to explain on what basis he knew about the white Nissan vehicle and related drug activity.

State v. McArn, 159 N.C. App. 209, 214, 582 S.E.2d 371, 375 (2003).

In *State v. Horton*, a police officer received a dispatch regarding a "suspicious white male, with a gold or silver vehicle in the parking lot" of a local business in an area with a history of break-ins. *State v. Horton*, __ N.C. App. __, __, __ S.E.2d __, __, 2019 N.C. App. LEXIS 302 at *2 (2019). When the officer arrived at the location, he exited his patrol vehicle and walked toward a silver car with a black male in the driver's seat, who then drove away. *Id.* at *2-3. The officer followed the vehicle because he thought the man's behavior was a little odd, but never observed "any bad driving, traffic violations, criminal offense, or furtive movements" prior to stopping the vehicle. *Id.* at *3. When the officer conducted a traffic stop, he smelled a strong odor of marijuana and searched the vehicle. *Id.* at *4. The search revealed narcotics, a scale, a stolen firearm, and cash. *Id.*

This Court found the officer's justification for the traffic stop was "nothing more than an inchoate and unparticularized suspicion or hunch." *Id.* at *11 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 7 (1989)). The anonymous tip "reported no crime and was only partially correct," and "it merely described the individual as 'suspicious' without any indication as to why." *Id.* at *15.

> The type of detail provided in the [anonymous] tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.

Id. at *12 (quoting *State v. Johnson*, 204 N.C. App. 259, 264, 693 S.E.2d 711, 715 (2010)).

Here, the details in the anonymous tip were not sufficient to even establish identifying characteristics, let alone to allow Deputy Franks to corroborate the details. *See id.* The anonymous tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After Deputy Franks passed the scene and the Cadillac and drove into a curve, he noticed a truck ahead driving under the posted speed limit. Deputy Franks' testimony indicated the road was curvy and the truck "was already in the curve" as he approached it from behind.

Deputy Franks provided no testimony tending to show the truck was engaging in any unsafe, reckless, or illegal driving behavior prior to his stop. He was unable to ascertain if there was even a passenger in the truck. At best, "all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." *Peele*, 196 N.C. App. at 674, 675 S.E.2d at 687.

Under the totality of the circumstances, Deputy Franks lacked reasonable suspicion to conduct a warrantless traffic stop of Mr. Griekspoor's truck. *See Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297-98. Nothing in the anonymous tip would have indicated *this* truck was the one that had pulled the car out of the ditch. The truck was merely driving along a public highway and not committing any driving infractions. Deputy Franks' stop of Mr. Griekspoor was nothing more than a warrantless search and seizure based upon a mere suspicion or a hunch. *Horton*, at *12.

The State concedes the anonymous tip, without more, was insufficient to justify the warrantless stop. The trial court erred in concluding Deputy Franks had a reasonable suspicion to stop the truck and in denying Defendant's motion to suppress.

VI. Conclusion

The anonymous tip was insufficient to provide reasonable suspicion for Deputy Franks to stop Mr. Griekspoor's truck travelling on a highway. Deputy Franks did not have reasonable suspicion to conduct this warrantless seizure and search. Based on our determination that the trial court's conclusion of law was error, we need not address Defendant's arguments concerning the trial court's findings of fact.

The trial court erred in denying Defendant's motion to suppress. We reverse and remand for entry of an order granting Defendant's motion. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissenting with separate opinion.

BERGER, Judge, dissenting.

I respectfully dissent.

> "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)). "The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) (citations and quotation marks omitted). "Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645.

State v. Jones, ___ N.C. App. ___, ___, 825 S.E.2d 260, 264 (2019). The "reasonable suspicion standard simply requires that '[t]he stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' " *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 117 (2016) (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)), *writ denied*, *review denied*, 369

N.C. 536, 797 S.E.2d 8 (2017). Generally, an anonymous tip is not sufficiently reliable to provide reasonable suspicion unless "it is buttressed by sufficient police corroboration." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000).

"Reasonable suspicion is a commonsense, nontechnical conception[ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Heien*, 366 N.C. 271, 280, 737 S.E.2d 351, 357 (2012) (*purgandum*). "The process of [determining reasonable suspicion] does not deal with hard certainties, but with probabilities . . . ." *United States v. Cortez*, 449 U.S. 411, 418 (1981).

In determining whether reasonable suspicion exists, "context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Mangum*, ___ N.C. App. at ___, 795 S.E.2d at 117 (quoting *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). "[T]he key determination is not the innocence of an individual's conduct, but the *degree of suspicion* that attaches to particular types of noncriminal acts." *Id.* at ___, 795 S.E.2d at 118 (citation and quotation marks omitted). For example, "driving substantially lower than the speed limit is a factor that may contribute to a police officer's reasonable suspicion in stopping a vehicle." *Id.*

Here, Officer Franks was dispatched to the area of Woodstock Road in Beaufort County at approximately 11:00 p.m. on January 8, 2016. Woodstock Road is in a remote, rural area. A concerned citizen had reported that a vehicle was in a ditch, and "the driver was attempting to get the vehicle pulled out by a truck." Officer Franks arrived approximately 10 minutes after being dispatched, and he observed an unoccupied Cadillac that was "catty-cornered" near a driveway. The Cadillac had mud on the driver's side. In addition, there were "gouges" in the road which caused Officer Franks to believe the Cadillac had left the roadway.

At the same time and place, Officer Franks also observed a truck approximately 200 feet in front of him on Woodstock Road. The truck was travelling fifteen to twenty miles per hour below the posted speed limit away from the Cadillac. Officer Franks did not encounter any other vehicles en route to Woodstock Road, or while he was on Woodstock Road that evening. Officer Franks pulled up behind the truck and initiated a traffic stop.

Standing alone, the tip from the concerned citizen was not sufficiently reliable to justify the stop. However, the tip was "buttressed by sufficient police corroboration." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 (citation omitted). At approximately 11:00 p.m., Officer Franks observed "gouges" in the roadway on Woodstock Road near the Cadillac. There was mud on the left side of the Cadillac, suggesting that the vehicle may have been in a ditch as the caller reported. Based upon Officer Franks' observations, a reasonable officer could infer that the Cadillac had left the roadway when it was being driven.

Further, Officer Franks only encountered two vehicles on Woodstock Road that evening. The two vehicles matched the description provided by the caller: a truck and a vehicle that appeared to have left the roadway. There was a high probability that the truck and the Cadillac off the roadway on a desolate rural road at 11:00 p.m. were the ones referenced by the concerned caller. These were the only two vehicles Officer Franks encountered that evening on Woodstock Road. Moreover, when he observed the only truck on the road, that vehicle was driving away from the area at a speed "substantially lower than the speed limit." *Mangum*, ___ N.C. App. at ___, 795 S.E.2d at 118. This evidence created a sufficient degree of suspicion for Officer Franks to stop the truck and investigate what appeared to be a single-car accident from an impaired driving offense.

While there are many innocent explanations for what took place on Woodstock Road that evening, Officer Franks' observations corroborated the information provided by the concerned caller that a driver that may have been impaired "was attempting to get the vehicle pulled out by a truck." The totality of the circumstances provided more than just a hunch that criminal activity was afoot. There was reasonable suspicion justifying the stop.

Because the trial court's findings of fact were supported by competent evidence, and those findings support the conclusions of law, I would affirm the trial court's order denying Defendant's motion to suppress.

STATE OF NORTH CAROLINA
v.
TYRONE CHURELL DAVIS, DEFENDANT

No. COA18-1017

Filed 21 May 2019

1. Rape—second-degree—jury instructions—no physical evidence or corroborating eyewitness testimony—referral to "the victim"

In a rape case in which there was no physical evidence of injury and no corroborating eyewitness testimony, the trial court did not erroneously express a judicial opinion by referring to the prosecuting witness as "the victim" during its jury charge. Even though it may have been the best practice for the trial court to say "alleged victim" or "prosecuting witness," defendant did not request this modification to the pattern jury instructions; furthermore, the trial court properly placed the burden of proof on the State.

2. Evidence—expert—rape prosecution—lack of physical evidence "consistent with" sexual abuse—plain error analysis

While it was improper for a nurse to testify that the lack of physical evidence of rape was "consistent with" sexual abuse, there was no plain error even assuming that the trial court erred by not intervening ex mero motu. The testimony was not improper vouching for the prosecuting witness's credibility, and the alleged error did not have a probable impact on the jury's verdict.

Judge BRYANT concurring in result only.

Appeal by Defendant from judgment entered 9 August 2017 by Judge Rebecca W. Holt in Orange County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

Defendant Tyrone Churell Davis appeals from a judgment finding him guilty of second degree rape and sexual battery.

On appeal, Defendant argues that he is entitled to a new trial based on portions of the jury charge and based on inadmissible testimony offered by one of the State's witnesses; namely, the nurse who examined Emma[1] and who was qualified as a "sexual assault nurse examiner" expert.

I. Background

Defendant was indicted and tried for two counts of second degree rape and one count of sexual battery against Emma.

The State's evidence showed as follows. On the night in question Emma and a friend went out drinking and then decided to go to Defendant's residence to purchase cocaine. While there, they snorted cocaine. Emma then fell asleep on a bed, fully clothed. Defendant and Emma's friend went back out. But at some point, Defendant returned to his residence by himself, where Emma was still asleep. Sometime later, early in the morning, Emma woke up with Defendant on top of her having sexual intercourse with her. Emma pushed Defendant off of her. She heard her friend knocking on the door. She opened the door and told her friend that she had been raped by Defendant. They called the police.

The only direct evidence of the rape *itself* offered by the State was Emma's testimony. The State also called Emma's friend; an emergency room physician and a nurse who treated Emma; and members of the police who were on duty early that morning. The physician testified that she did not perform a forensic exam of Emma, stating that she felt Emma was not sober enough to consent to an exam.

The nurse testified that she was able to physically examine Emma and question Emma, though Emma still smelled of alcohol and was sleepy. The nurse testified that her exam of Emma's pelvis was normal.

Defendant testified on his own behalf. He did not deny his sexual encounter with Emma, but he claimed that the encounter was consensual.

The jury found Defendant guilty as charged. Judgment was arrested on one count of second degree rape. Defendant was sentenced in the presumptive range for the remaining charges.

Defendant gave notice of appeal in open court.

---

1. A pseudonym is used to protect the individual's identity.

II. Analysis

Defendant makes two arguments on appeal. Defendant first argues that the trial court erred in referring to Emma as "the victim" during its jury instructions. Next, Defendant contends that the State's expert witness, the nurse who examined Emma, impermissibly vouched for Emma's credibility. We address each argument in turn.

We note that Defendant failed to object to these alleged errors at trial and, therefore, failed to preserve his arguments on appeal. Thus, we review Defendant's arguments for plain error. *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A. Trial Court's Labeling of Emma as "the Victim"

[1] Defendant argues that the trial court erroneously expressed a judicial opinion by referring to Emma as "the victim" during its charge to the jury. We disagree.

Defendant argues on appeal that the use of the term "the victim" in the jury instructions amounted to expression of a judicial opinion. An expression of judicial opinion is a statutory violation, and a "defendant's failure to object to alleged expressions of opinion by the trial court in violation of [a] statute[] does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). However, "where our courts have repeatedly stated that the use of the word 'victim' in jury instructions is not an expression of opinion," and the Defendant points to no other alleged instances of expression of judicial opinion, this issue is unpreserved. *State v. Phillips*, 227 N.C. App. 416, 420, 742 S.E.2d 338, 341 (2013). Therefore, we review for plain error.

It is well settled that when a "judge properly place[s] the burden of proof on the State[,]" referring to the complaining witness as "the victim" does not constitute plain error. *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994); *see State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003) ("[I]t is clear from case law that the use of the term 'victim' in reference to prosecuting witnesses does not constitute plain error when used in instructions[.]"). However, our Supreme Court has stressed that "when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions *at defendant's request* to use the phrase 'alleged victim'

or 'prosecuting witness' instead of 'victim.' " *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (emphasis added).

Here, it may have been the best practice for the trial court to "use the phrase 'alleged victim' or 'prosecuting witness' instead of victim' " during its charge to the jury. *Id.* However, a review of the trial transcript reveals that Defendant did not request such a change. *Id.* Moreover, the trial court properly placed the burden of proof on the State. *See McCarroll*, 336 N.C. at 566, 445 S.E.2d at 22. Thus, we conclude that it was not plain error for the trial court to refer to Emma as "the victim" in its jury instructions.

B. Expert Vouching for Credibility of Complaining Witness

[2] Defendant also contends that the State's expert witness impermissibly vouched for Emma's credibility. As Defendant did not object to the expert's testimony at trial, we also review this argument for plain error. *Bagley*, 321 N.C. at 211, 362 S.E.2d at 250.

It is well settled that an expert may not opine as to the credibility of a witness. *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986). For instance, an expert's testimony that a witness was *in fact* abused, absent physical evidence of said abuse, is inadmissible. *State v. Grover*, 142 N.C. App 411, 417, 543 S.E.2d 179, 183, *aff'd* 354 N.C. 354, 553 S.E.2d 679 (2001). However, an expert may testify that an alleged victim's physical injuries are consistent with the victim's testimony. *See State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (finding testimony that physical evidence was consistent with the alleged assault "vastly different from an expert stating on examination that the victim is 'believable' or 'is not lying.' "). Indeed, "otherwise admissible expert testimony is not rendered inadmissible merely because it enhances a witness's credibility." *In re Butts*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003) (citing *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) ("testimony based on the witness's examination of the child witness and expert knowledge . . . is not objectionable because it supports the credibility of the witness[.]")).

In the present case, the State's expert was a nurse who had interviewed and examined Emma. During her examination of Emma, Emma did not act distraught and she denied counseling. Further, the nurse testified that Emma showed no physical signs of penetration or other sexual contact. On re-direct, the expert testified that the lack of physical indicators was still consistent with someone who had been sexually assaulted, testifying as follows:

STATE: Now, in your training and experience, was this a consistent – was – was her exam consistent with people reporting of sexual abuse?

EXPERT: Yes.

STATE: Okay. And [defense counsel] had asked you about the previous – different times you had actually examined other people in your training and experience, that they had had some physical findings; correct?

EXPERT: Correct.

STATE: But you just told us that her exam was consistent with someone reporting a sexual assault; correct?

EXPERT: Correct.

STATE: Can you explain that.

EXPERT: Some patients who have been assaulted may not have physical findings or there may not be physical evidence to suggest an assault took place. Sometimes it – there could be physical findings and sometimes there is not.

STATE: Okay. In – in the times that you have been doing this, for the years you have been doing this, how many times have people come in with physical – actual physical – cuts, abrasions, all of that, that report this kind of complaint?

EXPERT: I can't really give a number, but it's less than those that do not have physical findings.

STATE: So most that come that report being sexually assaulted, especially in the manner that she talked about . . . don't present with physical findings like you are talking about?

EXPERT: That's correct.

STATE: And that's why this is consistent; is that right?

EXPERT: That's correct.

Defendant takes issue with these statements and likens them to those that have been found as inadmissible vouching. *See State v. Keen*, 309 N.C. 158, 164, 305 S.E.2d 535, 538-39 (1983) (ordering a new

trial where an expert went beyond the scope of the question asked and opined that "an attack occurred . . . this was reality[,]" which amounted to an opinion as to the guilt of the defendant); *see also State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (ordering a new trial where an expert's written report, which stated that the victim's disclosure "was credible[,]" was impermissibly admitted into evidence). In the present case, though, the State's expert did not explicitly state that Emma was in fact assaulted or that she was credible.

The expert did, however, state that Emma's "exam was consistent with someone reporting a sexual assault[,]" solely on the grounds that she did *not* have physical evidence of sexual abuse. But we note that this lack of physical evidence observed by the nurse is also consistent with someone who has *not* been sexually abused. *See State v. Towe*, 366 N.C. 56, 61-64, 732 S.E.2d 564, 567-69 (2012) (finding an expert's testimony to be improper where "she stated that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse"); *see also State v. Frady*, 228 N.C. App 682, 685-87, 747 S.E.2d 164, 167-68 (2013) (holding expert testimony that the victim's disclosure was "consistent with sexual abuse" prejudicial). In other words, this portion of the expert's testimony – in which she affirmatively stated that a *lack* of physical evidence is consistent with someone who has been sexually abused – should not have been allowed, as this testimony did not aid the trier of fact in any way. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017).

Even if an opinion of the nature offered by the State's expert would be helpful to a jury, there is nothing in the record to indicate a proper basis for the nurse's opinion. Such testimony should generally be based on the science of how and why the human body does not always show signs of sexual abuse. *Id*. The nurse's testimony here was not based on any science or other medical knowledge she may have possessed. Rather, she based her testimony on her assumption that all of the people that she had ever interviewed and examined were telling the truth, that they had all been sexually abused.

While it is impermissible for an expert to offer an opinion that a lack of physical evidence *is consistent with* sexual abuse, it may permissible for the State to offer expert testimony that the lack of physical evidence *does not necessarily rule out* that sexual abuse may have occurred. Such testimony might aid the trier of fact to understand that the lack of physical evidence does not necessarily mean that the defendant is not guilty. But again, here, there was nothing in the record to indicate that the nurse was qualified to give an opinion in this regard.

As we find that the nurse's opinion testimony was improper, we must determine whether its admission had a prejudicial effect on Defendant's trial. *Bagley*, 321 N.C. at 211, 362 S.E.2d at 250. A prejudicial effect is one that, but for the error in question, "a different result would have been reached at the trial[.]" *Frady*, 228 N.C. App. at 686, 747 S.E.2d at 167 (quoting N.C. Gen. Stat. § 15A-1443 (2017)).

Assuming that the trial court committed error by admitting the testimony without intervening *ex mero motu*, we conclude that any such error did not rise to the level of plain error. To be sure, Emma's testimony was the only direct evidence of Defendant's guilt. But the State elicited testimony from several other witnesses regarding the night and the event in question. Moreover, the nurse's testimony was *not* an expert opinion that Emma was telling the truth, which has been held in some cases to constitute plain error. Rather, the testimony was an expert opinion that a lack of physical evidence is consistent with sexual abuse. We cannot say that there is a reasonable probability that the jury assigned any great weight to this particular opinion as evidence corroborating Emma's testimony. We also cannot say that it is reasonably probable that the jury, using their common sense, did not understand that a lack of physical evidence can also indicate that no sexual abuse occurred. Certainly, it may be reasonably probable that a jury may find a complaining witness more credible where an expert testifies that the complaining witness is telling the truth. *See O'Connor*, 150 N.C. App. at 712, 564 S.E.2d at 297. But we conclude that it is not reasonably probable that the jury, here, found Emma's testimony more credible simply because the nurse stated that a lack of physical evidence is consistent with sexual abuse.

III. Conclusion

Judge Holt did not commit plain error when referring to Emma as the "victim" during its charge to the jury. And she did not commit plain error by failing to intervene *ex mero motu* and prevent the State's expert from testifying that a lack of physical evidence was "consistent with someone reporting a sexual abuse." Defendant received a fair trial, free from plain error.

NO PLAIN ERROR.

Judge ARROWOOD concurs.

Judge BRYANT concurs in result only.

STATE OF NORTH CAROLINA
v.
ALPHONSO DAWKINS, JR., DEFENDANT

No. COA18-1101

Filed 21 May 2019

1. Criminal Law—tactical decisions—impasse between defendant and counsel—stipulation to felon status

In a prosecution for possession of a firearm by a felon, the trial court properly denied the stipulation proposed by defendant's trial counsel regarding defendant's status as a convicted felon. Defendant had rejected his counsel's recommendation to sign the stipulation, creating an impasse on the matter, so the trial court was required to abide by defendant's wishes.

2. Appeal and Error—preservation of issues—objection outside presence of jury—failure to argue plain error

Where defendant objected outside of the jury's presence to the admission of a form showing his prior felony and misdemeanor convictions but failed to object when the form was offered into evidence, the issue of the form's admissibility was not preserved for appellate review. Defendant also waived plain error review by failing to specifically and distinctly argue that the alleged error amounted to plain error. The appellate court declined to invoke Rule 2 to consider the merits of the unpreserved objection because defendant refused to stipulate to the prior felony, effectively forcing the State to prove its case by publishing the form to the jury.

Appeal by Defendant from judgment entered 5 July 2018 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jane Atmatzidis, for the State-Appellee.

The Epstein Law Firm PLLC, by Drew Nelson, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon jury verdicts finding him guilty of possession of a firearm by a felon and misdemeanor

possession of marijuana, following a jury trial on 5 July 2018. Defendant contends that the trial court erred by (1) rejecting Defendant's trial counsel's attempt to stipulate to the fact that Defendant was a convicted felon and (2) allowing the State to introduce evidence of Defendant's prior felony conviction, which showed evidence of Defendant's prior misdemeanor convictions. Finding no error, we affirm.

I. Background

On 10 March 2017, Defendant crashed his vehicle into the front yard of a residence in Charlotte. Law enforcement officers arrived on the scene within minutes in response to a call describing the scene and informing dispatch that the driver of the vehicle had placed something inside a trash can next to the crashed vehicle.

Upon arrival, Defendant told the officers that he had lost control while driving. The officers received consent from the owner of the residence to search her trash cans, and found a half-empty bottle of alcohol and a firearm therein. The owner of the residence said that neither item belonged to her. One of the officers ran Defendant's information through the police database and learned that Defendant was a convicted felon, and arrested Defendant for possession of a firearm by a felon. After being placed under arrest, Defendant admitted to the officers that the firearm belonged to him and that he had placed it in the trash can.

The officers took Defendant to the police station and placed him in an interview room, which was monitored with audio and visual recording equipment. Once alone in the interview room, Defendant reached into his groin area, and the officers watched as he removed something from his person and placed it into his mouth. The officers reentered the interview room and demanded Defendant spit out what he had placed into his mouth. Defendant complied, and spit out three small plastic bags containing marijuana.

On 12 June 2017, Defendant was indicted for possession of a firearm by a felon, a violation of N.C. Gen. Stat. § 14-415.1 (2017), and misdemeanor possession of marijuana, a violation of N.C. Gen. Stat. § 90-95(d)(4) (2017). On 2 July 2018, Defendant pled not guilty to all charges, and trial commenced.

Prior to the beginning of trial, the State and Defendant's trial counsel agreed to stipulate that Defendant had previously been convicted of a felony. Defendant's trial counsel conferred with Defendant and read him the proposed stipulation, and then told the trial court that Defendant did not wish to sign the stipulation. Defendant's trial counsel stated that

he believed the stipulation to be in Defendant's best interest, and that he believed the decision of whether to stipulate was his to make, rather than Defendant's. Ultimately, the trial court rejected the proposed stipulation. The trial court noted that the State would be able to introduce the Judgment and Commitment form for Defendant's prior felony and misdemeanor convictions (the "Form") to prove Defendant's status as a convicted felon. The trial court also indicated that it might require certain portions of the Form to be redacted, and recommended that the parties confer about proposed redactions.

The following day, the parties and the trial court again discussed the Form. Defendant objected to the admission of the Form because it reflected Defendant's prior convictions for two misdemeanors, which Defendant argued would be prejudicial to him. The trial court conducted a balancing analysis under N.C. Gen. Stat. § 8C-1, Rule 403 (2018), and ruled that the evidence of the misdemeanors was not "overly prejudicial." Defendant did not specifically object to the evidence of the two prior misdemeanors, nor move the trial court to redact the evidence of the misdemeanors from the Form. The only content Defendant asked the trial court to redact was the "sentence imposed" on the Form for the felony and misdemeanor convictions combined, which the trial court declined to do because it found the sentence not "overly prejudicial." Defendant did not object further to the Form. The trial court thus allowed the Form's admission, subject to the redaction of the offenses charged, the prior record level, and the prior record points, but not the evidence of the misdemeanor convictions altogether.

At trial, the State called the Assistant Clerk of Superior Court of Mecklenburg County as a witness, who identified the Form. The redacted Form was shown to the jury, and the Assistant Clerk testified that it showed Defendant had been convicted of a felony and two misdemeanors. Defendant did not object to the Form's admission, or to the Assistant Clerk's testimony regarding the Form, when said evidence was offered at trial.

On 5 July 2018, the jury convicted Defendant of both offenses charged, and the trial court entered judgment sentencing Defendant to 22-36 months' imprisonment. Defendant timely appealed.

II. Appellate Jurisdiction

This Court has jurisdiction to hear Defendant's appeal of the judgment under N.C. Gen. Stat. § 7A-27(b)(1) (2018).

III. Analysis

Defendant contends that the trial court erred by (1) rejecting Defendant's trial counsel's attempt to stipulate to the fact that Defendant was a convicted felon and (2) allowing the State to introduce evidence of Defendant's prior felony conviction, which showed evidence of Defendant's prior misdemeanor convictions. We address each argument in turn.

a. Stipulation

[1] Defendant first argues that the trial court erred by denying the stipulation proposed by the State and Defendant's trial counsel regarding Defendant's status as a convicted felon, a proposed stipulation that the record reflects Defendant refused to sign when asked. By rejecting the stipulation proposed by his trial counsel, Defendant argues, the trial court failed to heed Defendant's trial counsel's decision, and as a result, Defendant was deprived of his right to effective counsel guaranteed by the Sixth Amendment to the United States Constitution. Because the trial court deprived Defendant of his right to effective counsel, the argument continues, the trial court committed reversible error and Defendant's subsequent convictions must be set aside.

Defendant's argument is premised upon the proposition that, where a defendant and his lawyer reach an impasse regarding a tactical decision to be made at trial—here, the decision of whether to require the State to prove that Defendant was a convicted felon, or to stipulate to that fact—it is the defendant's lawyer's desired tactical decision that controls, rather than the defendant's. This premise has been specifically rejected by our Supreme Court. In *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), the Court held:

> While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld. . . . [W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to

> the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. at 403-04, 407 S.E.2d at 189 (citation omitted).

The record reflects the following: (1) the circumstances leading to the disagreement between Defendant and his trial counsel regarding the proposed stipulation; (2) that, in conference with Defendant, Defendant's trial counsel advised Defendant to sign the proposed stipulation; (3) that Defendant's trial counsel so advised Defendant because the Form that the State otherwise would almost certainly use to prove that Defendant was a convicted felon contained evidence which Defendant's trial counsel believed ran the risk of prejudicing Defendant, and Defendant's trial counsel thus believed stipulating was in Defendant's best interest; (4) that, after receiving his trial counsel's advice, Defendant refused to sign the proposed stipulation; (5) that Defendant's trial counsel petitioned the trial court to accept the proposed stipulation despite Defendant's unwillingness to stipulate (creating the "absolute impasse" contemplated by *Ali*); and (6) the trial court rejected the proposed stipulation.

Defendant argues that *Ali* is inapplicable here because he was not "fully informed" regarding the stipulation and because his "refusal to sign the stipulation should be seen as a refusal to participate in the trial process and a knee-jerk refusal of his counsel's recommendation" rather than the "absolute impasse" between a defendant and his trial counsel contemplated by *Ali*.

Defendant's statement that he "refus[ed] his counsel's recommendation"—in "knee-jerk" fashion or otherwise—is a concession that Defendant understood his trial counsel's recommendation and that he could take it or leave it. If at that point Defendant did not feel adequately informed by his trial counsel to make the decision he faced, Defendant could have expressed a lack of understanding to his trial counsel or to the trial court and sought further explanation. The record nowhere reflects that Defendant had such a lack of understanding regarding the stipulation, that he asked his trial counsel or the trial court for more information, or that he took any other steps to inform himself. To the contrary, the record reflects that Defendant specifically told his trial counsel that he did not want to sign the stipulation. It is Defendant's burden to demonstrate to this Court that his trial counsel was ineffective and prejudiced his case, *State v. Banks*, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014), and without supporting evidence in the record, we cannot conclude that Defendant was not "fully informed" within the meaning of *Ali*.

Defendant's argument that his refusal to sign the stipulation was a "refusal to participate in the trial process" rather than an impasse with his trial counsel is unavailing. Defendant was faced with a choice: to heed his counsel's recommendation to sign the stipulation, or to reject his counsel's recommendation and refuse to sign the stipulation. Defendant chose the latter course, and because Defendant's trial counsel maintained his insistence upon the former, an impasse was created within the meaning of *Ali*, which controls our analysis.

Because we hold that Defendant's decision not to stipulate was controlling under *Ali*, the trial court was required to abide by Defendant's wishes and reject the stipulation. *State v. Freeman*, 202 N.C. App. 740, 746, 690 S.E.2d 17, 22 (2010) ("It was error for the trial court to allow counsel's decision to control when an absolute impasse was reached on this tactical decision, and the matter had been brought to the trial court's attention."). We accordingly conclude that the trial court did not violate Defendant's Sixth-Amendment right to effective counsel or otherwise err by rejecting the proposed stipulation sought by Defendant's trial counsel.

b. Misdemeanors

[2] Defendant also argues that by allowing the State to introduce the Form[1] as evidence of Defendant's prior felony conviction, when the Form also contained evidence of Defendant's prior misdemeanor convictions, the trial court erred by admitting irrelevant evidence that unfairly prejudiced Defendant.

The record reflects that Defendant objected to the Form's admission on the day of the trial on the grounds of prejudice, during a colloquy with the trial court and the State that took place outside of the presence of the jury and before the Form was offered into evidence, and that Defendant's objection was overruled at that time. The record does not reflect that Defendant (1) objected during the colloquy to the Form's

---

1. In his arguments, Defendant fails to acknowledge that he objected only to the admission of the Form *as a whole* during his preliminary colloquy with the trial court and the State. Defendant never specifically objected to those portions of the Form reflecting the misdemeanor convictions, or asked the trial court to redact those portions. Defendant's argument on appeal that "the misdemeanor convictions should have been redacted" because "[t]rial counsel for [Defendant] objected to the inclusion of the misdemeanor convictions and requested that they be redacted from the form" fails both for (1) Defendant's failure to cite to any authority setting forth a duty to redact prejudicial evidence from relevant documents admitted and (2) the fact that the record does not reflect that Defendant's trial counsel made the objection that Defendant suggests.

admission on relevance grounds, or (2) objected to the Form's admission on any ground when it was actually offered into evidence.

Where a defendant objects to evidence at trial outside of the presence of the jury, but fails to object when the evidence is actually admitted, the issue of the evidence's admissibility is not preserved for appellate review. *See State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) ("a trial court's evidentiary ruling on a pre-trial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial"); *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995) ("A motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial."). Since Defendant failed to object to the Form when it was offered into evidence, the issue of the Form's admissibility was not preserved.

We may review unpreserved evidentiary errors in criminal cases for plain error. *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018). Under plain error review, a defendant "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *Id.* at 563, 819 S.E.2d at 370 (citation omitted). However, a defendant must "specifically and distinctly" contend on appeal that the error amounted to plain error. N.C. R. App. P. 10(a)(4) (2018). As the State argues, Defendant does not contend that the trial court committed plain error, but merely states that Defendant was prejudiced by the trial court's purported error. By failing to "specifically and distinctly" argue that the purported error amounted to plain error, Defendant has waived plain error review. *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (holding defendant "waived appellate review of [unpreserved] arguments by failing specifically and distinctly to argue plain error").

Finally, Defendant asks us to suspend the requirements of Appellate Rule 10 and consider the merits of his unpreserved objection to "prevent manifest injustice to a party[.]" N.C. R. App. P. 2 (2018). But because the record shows that Defendant was able but refused to stipulate that he was a convicted felon, and by so doing effectively required the State to prove its case by publishing the Form (and potentially the evidence of his prior misdemeanor convictions reflected thereupon) to the jury, we discern no manifest injustice to prevent. *See* N.C. Gen. Stat. § 15A-1443(c) (2018) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *State v. Eason*, 336 N.C. 730, 741, 445 S.E.2d 917, 924 (1994) ("When a party invites a

course of action, he is estopped from later arguing that it was error."). We therefore decline to invoke Appellate Rule 2.

IV. Conclusion

Because Defendant refused to sign the proposed stipulation regarding his status as a convicted felon, the trial court did not err in rejecting the proposed stipulation. Defendant's failure to object to the admission of the Form when it was offered into evidence at trial means that his objection is unpreserved, and Defendant's failure to argue that the trial court's admission of the Form had a probable impact upon the jury's decision to convict him constitutes a waiver of plain error review. We accordingly find no error.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
DAVID ALAN KELLER, DEFENDANT

No. COA17-1318

Filed 21 May 2019

Criminal Law—jury instructions—defenses—entrapment—solicitation of a minor

Defendant failed to prove he was entitled to a jury instruction on the defense of entrapment for his charge of solicitation by computer or electronic device of a person believed to be fifteen or younger for the purpose of committing an unlawful sex act and appearing at the meeting location, where the evidence supported defendant's predisposition and willingness to commit the crime. He responded to an online posting entitled "Boy Needing a Man," repeatedly stated he was looking for a "boy," and attempted to meet the online poster (an undercover officer) to engage in sexual acts after being told the poster was fifteen years old.

Judge INMAN dissenting.

STATE v. KELLER

[265 N.C. App. 526 (2019)]

Appeal by defendant from judgment entered 26 September 2016, by Judge Eric L. Levinson in Lincoln County Superior Court. Heard in the Court of Appeals 6 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

BERGER, Judge.

On August 23, 2016, a Lincoln County jury found David Alan Keller ("Defendant") guilty of solicitation of a minor by computer or electronic device and appearing at a meeting location for the purpose of committing an unlawful sex act. Defendant timely appeals, arguing that the trial court erred when it did not submit the defense of entrapment to the jury. We find no error.

Factual and Procedural Background

On May 11, 2015, Detective Brent Heavner ("Detective Heavner") of the Lincolnton Police Department went undercover online as a fifteen-year-old boy with the fictitious name "Kelly." As part of a year-and-a-half-long operation targeting online sexual predators, "Kelly" posted a personal advertisement titled "Boy Needs a Man" on Craigslist's adults-only "Personal Encounters" section, which read:

> Okay. I never, never did this so here it goes. I'm wanting to experience a man. Never had tried I but want to. I have been with a girl and I want to try a man. Am posting here because I want a complete stranger so no one will find out about this. I would like an older man that is not shy and knows what to do because I will probably be a little nervous. I would prefer a pic and a number so we can, so we cannot use e-mail. I will be picky so be patient but would like to do this soon. You would have to come to me. Would like to try anything. And I am a white male open to anyone.

The next day, at 6:07 a.m., Defendant responded to "Kelly's" advertisement as follows:

> Hey[.] I am a 44 white male looking for a young guy to take care of and spoil[.] I am 175 pounds, 32/32 pants, 6.5 cut,

> DD free. If you would like to be a daddy's boy and have your every need provided for you let me know I am looking for a boy to treat very special.

At 10:52 a.m., "Kelly" responded, "whats your number and what do you like[?]" Defendant e-mailed his phone number. When "Kelly" did not answer immediately, Defendant sent the following three emails later that day:

> 2:43 p.m.: I sent you my number. I look like a 44 year old guy. Not fat and not ugly.
>
> 9:38 p.m.: Are u still needing a man. I am still looking for a boy[.]
>
> 9:51 p.m.: This man is still looking for his boy toy[.]

Over the next few days, "Kelly" and Defendant exchanged a series of text messages all detailing Defendant's desire for "Kelly" to live with him. After initial introductions, Defendant stated, "I could offer you a home. Car to drive[,] phone[,] clothes[, and] money to spend. Pretty much what ever you need." "I have had 3 boys. They never had to work and got everything they ever asked for[.]" When Defendant and "Kelly" exchanged photos (Detective Heavner used a photo from Google images), Defendant stated, "I would love to make you my boy," "I would take really good care of you," "I think you're a little hottie," and "I could have sex 5 times a day." "Kelly" responded that he could move in that day, but he was afraid that he may be too young for Defendant.

> [Detective Heavner]: I may be too young but I am needing a place to go, my aunt is about to put me back in foster care and I will run away if she does[.]
>
> [Defendant]: How old are u[?] If your 17 it's legal[.]
>
> [Detective Heavner]: I am not quiet (*sic*) 16 and actually 16 is the legal age[.]
>
> [Defendant]: Send me a pic I can see your face please[.]
>
> [Detective Heavner]: I am scared to show my face right now.
>
> [Defendant]: Well. I could let you live here with me and take care of you. But we could not have sex till you was old enough[.] . . . I do not want to go to jail[.] I had one boy I played with when he was 16 but turned 17 the next week[.]

. . . .

> [Defendant]: You know my son got on line and thought he was talking to a girl it turned out to be a cop and when he went to meet her he got arrested and went to jail for 3 years[.]
>
> [Detective Heavner]: For real?
>
> [Defendant]: Yes for real he really went to jail for 3 years and now has to register as a sex offender[.]

Knowing the consequences of talking online to a stranger and knowing that "Kelly" was not yet sixteen-years-old, Defendant continued the conversation, agreeing to have sexual relations with "Kelly."

> [Detective Heavner]: I am very curious[.]
>
> [Defendant]: Curious about what[?]
>
> [Detective Heavner]: I don't know how to say it[.]
>
> [Defendant]: Just say it. I won't judge you[.]
>
> [Detective Heavner]: How do I know if I am[.] And if I come there and we can't be sexual it might be a mistake[.]
>
> [Defendant]: I said we could[.]
>
> [Detective Heavner]: You said we could when I am old enough for u[.]
>
> [Defendant]: Well like I said don't want to talk through text. But will talk to you in person about it[.]
>
> [Detective Heavner]: You said I said we could so does that mean yes cuz if not I may have to find someone else first to see what its like[.]
>
> [Defendant]: Don't find anyone else. Please[.]
>
> [Detective Heavner]: Only if we can have oral sex and anal tomorrow so I will know, just give me a yes or no and I will shut up about it[.]
>
> [Defendant]: Yes[.]

. . . .

> [Defendant]: I have been looking for a boy for a long time[.]

After exchanging numerous texts, Defendant agreed to meet "Kelly" and take him back to Defendant's home. When Defendant arrived at the meeting location, officers were on scene and placed Defendant under arrest.

On August 18, 2016, Defendant was indicted for solicitation by computer or electronic device of a person believed to be fifteen or younger for the purpose of committing an unlawful sex act and appearing at the meeting location where he was to meet the person whom he believed was a child. At trial, Defendant testified that he began using Craigslist's personal advertisements in 2006. He stated that over the course of eleven years, he had met multiple men on the website and three even lived with him for extended periods of time. Defendant testified that he responded to "Kelly's" advertisement because he and his live-in companion were having problems and Defendant wanted to make him jealous. After repeatedly claiming that he just wanted to "make sure Kelly was okay," Defendant finally conceded that sex is a part of what he gets in return for his generosity.

On August 23, 2016, the jury found Defendant guilty as charged. On September 26, 2016, the trial court sentenced Defendant to ten to twenty months imprisonment and mandatory registration as a sex offender for thirty years. Defendant filed a petition for a writ of certiorari, which was granted by this Court. Defendant argues on appeal that the trial court erred when it failed to instruct the jury on entrapment.

Analysis

"Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo." *State v. Ott*, 236 N.C. App. 648, 651, 763 S.E.2d 530, 532 (2014) (citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment, for that of the lower tribunal." *Id.* at 651, 763 S.E.2d at 533 (citation and quotation marks omitted).

"In determining whether a defendant is entitled to a jury instruction on entrapment, the trial court must view the evidence in the light most favorable to the defendant." *State v. Morse*, 194 N.C. App. 685, 690, 671 S.E.2d 538, 542 (2009) (citation omitted). "Before a [t]rial [c]ourt can submit [an entrapment] defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment. . . ." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d

191, 197 (1955) (citations omitted). "The issue of whether or not a defendant was entrapped is generally a question of fact to be determined by the jury, and when the defendant's evidence creates an issue of fact as to entrapment, then the jury must be instructed on the defense of entrapment." *Ott*, 236 N.C. App. at 651-52, 763 S.E.2d at 533 (*purgandum*).

"Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him." *State v. Davis*, 126 N.C. App. 415, 417, 485 S.E.2d 329, 331 (1997) (citation omitted). "Entrapment is a complete defense to the crime charged." *Morse*, 194 N.C. App. at 689, 671 S.E.2d at 542 (citation and quotation marks omitted). The defendant has the burden of proving the affirmative defense of entrapment. *State v. Luster*, 306 N.C. 566, 579, 295 S.E.2d 421, 428 (1982).

"The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies." *State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982) (citations omitted). "We note that this is a two-step test and the absence of one element does not afford the defendant the luxury of availing himself of the affirmative defense of entrapment." *Morse*, 194 N.C. App. at 690, 671 S.E.2d at 542. Under this test, "[t]he defendant must show that the trickery, fraud or deception was practiced upon one who entertained no prior criminal intent." *Hageman*, 307 N.C. at 28, 396 S.E.2d at 449 (*purgandum*).

"A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. The determinant is the point of origin of the criminal intent." *Morse*, 194 N.C. App. at 690, 671 S.E.2d at 542. When analyzing whether a defendant was predisposed to commit the crime, our Supreme Court has stated: " '[w]illing' is a synonym of the word 'predisposed.' " *Hageman*, 307 N.C. at 26, 396 S.E.2d at 447 (citation omitted). Therefore, "[p]redisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 396 S.E.2d at 450-51 (citations omitted).

"It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of governmental inducement and influence." *Id.* at 29, 396 S.E.2d at 449.

> The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution, nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the [g]overnment's deception *actually implants the criminal design* in the mind of the defendant that the defense of entrapment comes into play.

State v. Salame, 24 N.C. App. 1, 7, 210 S.E.2d 77, 81-82 (1974) (citation and quotation marks omitted) (emphasis added).

This Court was presented with a similar legal and factual scenario in *State v. Morse*. *State v. Morse*, 194 N.C. App. 685, 671 S.E.2d 538. In *Morse*, the defendant entered an adults-only online chat room and began speaking with an undercover law enforcement officer. *Id.* at 694, 671 S.E.2d at 539-41. As part of an undercover operation, the officer posted as a fourteen-year-old girl claiming that "she was inexperienced and looking for an older 'friend.' " *Id.* at 687, 671 S.E.2d at 540. When Morse went to meet the officer in person, he was arrested. *Id.* at 687, 671 S.E.2d at 540.

Morse appealed his conviction and argued that the trial court erred when it refused to submit the defense of entrapment to the jury. *Id.* at 689, 671 S.E.2d at 541-42. In concluding that the trial court did not err in not submitting the entrapment defense to the jury, the *Morse* Court held that "[a]lthough defendant did not have a criminal record, record of molestation, or record of other similar offensive acts, uncontroverted record evidence shows that defendant had previously engaged in sexually explicit communications with other users in adults only chat rooms and even met with one of those users to engage in sexual contact." *Id.* at 692, 671 S.E.2d at 543.

Here, Defendant failed to prove he was entitled to an instruction on entrapment. The evidence supports Defendant's predisposition and willingness to engage in the crime charged. Defendant responded to a posting entitled "*Boy* Needing a Man" with messages that (1) inquired if Kelly wanted to by a "daddy's *boy*," (2) stated Defendant was "looking for a *boy*," and (3) repeated that Defendant was "still looking for a *boy*" when Kelly failed to respond quickly enough for Defendant. (Emphasis added). Even after "Kelly" told Defendant he was fifteen-years-old and may be too young, Defendant continued to speak with Kelly, and Defendant asked Kelly to send him a picture. Defendant then sent sexually explicit

messages to someone he believed was fifteen years old and attempted to meet "Kelly" for the purpose of engaging in sexual acts. Thereafter, he readily agreed to have oral and anal sex with "Kelly" when they were to meet.

Additionally, Defendant failed to sufficiently demonstrate that he was not predisposed to committing the act. As in *Morse*, it is irrelevant that Defendant did not have a criminal record, never solicited a child for sex, never had sex with a child, or never brought a child into his home. Contrary to Defendant's assertion, Detective Heavner did not manipulate Defendant into the ongoing conversation, nor did he "actually implant [ ] the criminal design" in Defendant's mind. *Salame*, 24 N.C. App. at 7, 210 S.E.2d at 81-82. Detective Heavner merely afforded Defendant the opportunity to commit the offense in which he willingly engaged.

Moreover, Defendant had a nine-year history of responding to personal advertisements on Craigslist. He brought three of the men he had interacted with over the years into his home. One of the three, with whom he had engaged in sexual conduct, was sixteen-years-old. Furthermore, even after "Kelly" informed Defendant that he may be too young, Defendant continued to speak with him. After Defendant told Detective Heavner that he could come live with Defendant and that Defendant could take care of "Kelly," Defendant readily agreed to have oral and anal sex with "Kelly" the following day. At trial, Defendant even admitted that sex is a part of what he receives in return for his generosity to the people he met online.

Even when viewed in the light most favorable to Defendant, he has failed to demonstrate that he was entitled to an instruction on entrapment.

Conclusion

The trial court did not err when it declined to submit the defense of entrapment to the jury.

NO ERROR.

Judge TYSON concurs.

Judge INMAN dissents in separate opinion.

INMAN, Judge, dissenting.

Because the evidence required the trial court to instruct the jury on Defendant's defense that he was entrapped by Detective Heavner, I respectfully dissent.

"It is the duty of the court to charge the jury on all substantial features of the case arising on the evidence . . . [a]nd all defenses presented by defendant's evidence are substantial features of the case[,]" *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted). This duty is particularly important when the defense concerns the conduct of State actors.[1] I would hold the trial court committed prejudicial error in denying Defendant's request for an instruction on entrapment, vacate his conviction, and remand for a new trial. I express no opinion regarding whether Defendant is guilty or innocent—that question is reserved for a jury.

I. FACTUAL HISTORY

As the majority rightly points out, although Defendant bears the burden of proof in seeking an entrapment instruction,[2] resolution of this appeal requires us to consider the evidence introduced at trial in the light most favorable to the Defendant. We also, "[f]or purposes of the entrapment issue, . . . must assume that [D]efendant's testimony is true." *State v. Foster*, 235 N.C. App. 365, 374, 761 S.E.2d 208, 215 (2014); *see also State v. Ott*, 236 N.C. App. 648, 652, 763 S.E.2d 530, 533 (2014). Given this standard of review, examination of Defendant's evidence not addressed in the majority opinion, including Defendant's testimony, is necessary.

Defendant testified at trial that he sought personal relationships with men via Craigslist, as opposed to other online services, because children frequented other websites and Craigslist requires each user to verify

---

1. The defense of entrapment is itself a check on unwarranted government intrusion into the lives of the citizenry and a limitation on the misallocation of State resources: "[L]aw enforcement tactics that seek to induce persons who are not predisposed to crime to engage in criminal activity are intolerable for two reasons. First, individuals have a strong interest in privacy: law-abiding people should be left alone by the government. Second, law enforcement resources are wasted when the subjects of investigation are not predisposed to commit crimes." *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122, 1130-31 (1982) (footnotes omitted).

2. Defendant bears "the burden of proving entrapment to the satisfaction of the jury." *State v. Davis*, 126 N.C. App. 415, 418, 485 S.E.2d 329, 331 (1997). The measure of proof that satisfies this burden is for the jury to determine, and may be as low as a bare preponderance of the evidence. *State v. Miller*, ___ N.C. App. ___, ___, 812 S.E.2d 692, 695 (2018).

that he is eighteen or older. Defendant posted "off and on" to Craigslist, sometimes looking to "meet somebody" on the Casual Encounters section of the site, which largely, but not exclusively, featured people looking for sex. He testified that after meeting someone online, he would "take care of them and help them out until they move on, . . . that's just what I do." He further explained that he "enjoy[s] having somebody to take care of. Not for sex. . . . That, that's not what it's about. It's about just being needed and taking care of somebody." Defendant characterized these relationships as offering "[c]ompanionship," admitting that sex "[o]ccasionally" factored into them but also insisting that "[i]t's not every time, no. . . . [It] wasn't a primary objective." Instead of sex, Defendant testified, the common element was simply helping the person until he could get back on his feet by offering a free place to stay, assistance with employment or school, and money for clothes and transportation.

Defendant met hundreds of men on Craigslist; some of the men moved in with Defendant and "[s]ome just bec[a]me friends." For example, Defendant, after responding to ads in the Casual Encounters section of Craigslist, met two young men and allowed them to move into his house. Defendant bought the men clothes and gave them money, but he never had sex with either of them.[3] Although Defendant testified that he had sex with four men who had previously lived with him—only one of whom he met on Craigslist—each was eighteen or older.[4] Defendant flatly denied ever soliciting a minor on Craigslist or otherwise.

Defendant testified that he responded to Detective Heavner's Craigslist ad not because he was seeking sex with a minor, but because he wanted to make his boyfriend jealous. Defendant admitted that his first response to Detective Heavner's Craigslist ad was sexual in nature.

---

3. Despite their Craigslist personals referring to them as "boys," both of these men were eighteen years old or older. Defendant testified that he "call[ed] everybody 'boy'[,]" particularly people under the age of 25, and another witness who testified at trial corroborated Defendant's testimony that he used the word to refer to adult men younger than him. Defendant further testified that he understood Detective Heavner's use of the phrase "boy toy" to refer to a younger man with an older man, but that Defendant did not believe it carried a sexual connotation. Defendant also testified that he used the word "boy" in correspondence with Detective Heavner to mean "[a] person that I take care of."

4. The majority asserts Defendant had sex with a sixteen-year-old boy who moved into Defendant's home after interacting with him on Craigslist. This fact is simply not supported by the evidence when viewed in the light most favorable to the Defendant. Although Defendant admitted texting Detective Heavner that he "had one boy I played with when he was 16 but turned 17 the next week[,]" he testified that this referred to a sexual encounter he had at the age of nineteen, 33 years earlier. In any event, sixteen is the age of consent in North Carolina. N.C. Gen. Stat. §§ 14-27.25 and 14-27.30 (2017).

He also testified, however, that he believed he was responding to an ad placed by an adult. Defendant admitted to discussing sex with Detective Heavner in their early text messages back and forth, but these text messages all occurred before Detective Heavner disclosed "Kelly's" age. After these initial messages, Detective Heavner texted the following: "I may be to[o] young but I am needing a place to go, my aunt is about to put me back in foster care and I will run away if she does[.]" Defendant replied by asking how old "Kelly" was and stated "[i]f you're 17 it's legal." "Kelly" responded: "I am a good kid, just my parents are shit bags and are in prison and I am the one suffering, I am not quiet [sic] 16 and actually 16 is the legal age."

Defendant testified he did not recall seeing a reference to "Kelly" being under sixteen at the time he was texting with Detective Heavner, but that he "was under the impression" from the text messages that "Kelly" was seventeen years old and under the age of eighteen, not fifteen years old and under the age of consent. Defendant also testified that he would not have sex with anyone under eighteen. Defendant's next mention of sex confirms this: "Well. I could let you live here with me and take care of you[.] . . . But we could not have sex till [sic] you was [sic] old enough." Defendant then reiterated his desire not to have sex with "Kelly" if he was underage: "But I do not want to go to jail. . . . So I could not have sex till [sic] you was [sic] old enough."

As pointed out by the majority, Defendant continued to interact with "Kelly" after learning he was under eighteen. He did so, per his testimony, to "make sure this person is okay[,]" because "when ['Kelly'] started talking about [how] he was living with his aunt and she didn't want him, his parents [were] in jail, he was going to run away, he was going to find the next available guy, I remember telling him that's dangerous, you know, you could get hurt." His testimony continued:

> [DEFENDANT:] I still kept talking to ["Kelly"] because he said, "If you don't quit talking to me, I'm going to go ahead and get somebody else."
>
> I said, "No, no, no. Don't do that."
>
> So now I'm really concerned. You know, there's crazy people out there.
>
> . . . .
>
> [DEFENDANT'S COUNSEL:] Okay. And after you had texted that, "We can wait until you are old enough," who brought up the idea of any other sexual act or –

> [DEFENDANT:] Detective [Heavner] is the only one that brought up anything sexual.
>
> . . . .
>
> Sex was not on my mind at this time. The only thing that was on my mind was that this person was really going to go out and meet somebody else. Was he really without food? Was he really without clothes? Was he really in a situation where his aunt didn't want him? His parents are in prison. If all this is true, it's all the factors for danger.

Following Defendant's expression of his unwillingness to have sex with "Kelly" as a minor because he did not want to go to prison, it was Detective Heavner, and not Defendant, who re-initiated the discussion of sex. Ensuing responses from Defendant certainly could be construed by a jury—which, unlike this Court, is not bound by any presumption favorable to Defendant—to indicate sexual interest in "Kelly." At trial, however, Defendant offered non-sexual explanations for many of these comments, which our precedents require us to take as true. *Foster*, 235 N.C. App. at 374, 761 S.E.2d at 215; *Ott*, 236 N.C. App. at 652, 763 S.E.2d at 533.

Defendant's text messages included a request for a picture of "Kelly's" face, which Defendant testified he asked for in order to try and verify "Kelly's" age, and a statement that "[w]e could do all you wanted to do if you was my boy[,]" which Defendant described as offering "Kelly" a place to live without the fulfillment of any sexual desires.[5] At one point in the conversation, "Kelly" stated he wanted Defendant to be the first man with whom he had sex; four messages later, Defendant replied, "Ok. Well we can fix that. We will go slow[,]" a remark not inconsistent with an intent to wait until "Kelly" was older.

Shortly after Defendant's message to "Kelly" that they would "go slow," Officer Heavner proposed meeting immediately. Defendant responded with an offer to meet the following day. "Kelly" replied by texting: "Ok. . . . I want to perform oral sex on [you] really bad for some reason can we do that[?]" Defendant demurred, texting he did not want to talk about sex; he testified at trial that it was his practice to refrain from talking about sex via text message on his phone because he found

---

5. As recounted *supra*, Defendant testified that he used the word "boy" with Detective Heavner to describe men he takes care of, a relationship he explained elsewhere in his testimony as not necessarily involving sex.

it vulgar. The issue did not arise again until several messages later, when "Kelly" expressed a fear that he might not be gay, and was therefore unsure if he should move in with Defendant without having sex together first. Defendant responded that he had previously said they could have sex; "Kelly" replied, "[y]ou said we could when I am old enough for [you.]" Defendant once more requested that they not discuss sex through text messages. That statement was followed by this exchange:

> [DETECTIVE HEAVNER:] You said ["]I said we could["] so does that mean yes [because] if not I may have to find someone else first to see what its like[.]
>
> [DEFENDANT:] Yes[.]
>
> . . . .
>
> [DEFENDANT:] Don't find anyone else. Please[.]
>
> [DETECTIVE HEAVNER:] Only if we can have oral sex and anal tomorrow so I will know, just give me a yes or no and I will shut up about it[.]
>
> [DEFENDANT:] Yes[.]

Defendant testified he made these statements because he did not want "Kelly," in an effort to escape a desperate home life, to find another man who might be dangerous, and that he "just said 'yes' to shut ['Kelly'] up." Detective Heavner issued his ultimatum after Defendant had warned "Kelly" that other men might try to harm him. After the ultimatum, Defendant did not engage in any sexually explicit conversation or discuss any sex acts with "Kelly," despite Detective Heavner repeatedly doing so; indeed, Defendant again asked "Kelly" to "[s]top talking about sex stuff."

The text messages eventually returned to the topic of the logistics of meeting, with Defendant agreeing to meet the following day around lunchtime. Defendant testified that he agreed to that arrangement because it would offer him the chance:

> to sit down and speak with ["Kelly's"] aunt and [a neighbor Detective Heavner had mentioned in an earlier message], [to] make sure everybody knew what was going on. If he did need a place, I would take him back. I had the room. I would give him a place to live and t[ake] care of him and provide[] him things.
>
> . . . .

That's why I wanted to talk to his aunt and the neighbor[.]

Following further discussion about picking up "Kelly," Defendant travelled to Lincolnton and was arrested at the meeting spot.

II. ANALYSIS

A. Defendant's Intent

The majority holds that Defendant had the requisite intent to solicit a minor for sex, so that an entrapment instruction was improper. The majority's position, however, is based on several assertions that are not supported by the evidence when it is considered in the light most favorable to the Defendant, as required by the applicable standard of review. *Ott*, 236 N.C. App. at 651-52, 763 S.E.2d at 533.

First, the majority states that "after 'Kelly' told Defendant he was fifteen-years-old and may be too young, Defendant continued to speak with Kelly[,]" later "sen[ding] sexually explicit messages to someone he believed was underage[.]" The evidence presented at trial, when considered in the light mandated by our precedents, does not support this contention. Defendant testified that he initially believed he was conversing with someone eighteen or older. When "Kelly" texted that he was not eighteen, Defendant testified, he did not actually understand that "Kelly" was fifteen, but was instead "under the impression" he was seventeen. Defendant testified that he did *not* "sen[d] sexually explicit messages to someone he believed was underage," as asserted by the majority. Although the jury might not have believed this testimony and rejected Defendant's entrapment defense, our precedents require that, when considering whether the instruction was mandated, *i.e.*, whether the jury should decide this issue, we must take Defendant at his word. *Foster*, 235 N.C. App. at 374, 761 S.E.2d at 215; *Ott*, 236 N.C. App. at 652, 763 S.E.2d at 533.

Second, the majority writes that Defendant "attempted to meet 'Kelly' for the purpose of engaging in sexual acts" and "[t]hereafter . . . readily agreed to have oral and anal sex with 'Kelly' when they were to meet." But Defendant testified that once he suspected "Kelly" was under eighteen, he expressly refused to have sex with him until he was older, ceasing further sexual comments until the subject was brought back up by Detective Heavner. Although Defendant sent additional messages after that point, those messages are not inconsistent with an intent to have sex only once "Kelly" was of age. Defendant provided non-sexual explanations for many of those texts. Defendant also testified that he did not attempt to meet "Kelly" "for the purpose of engaging in sexual

acts[,]" and that he only agreed to have sex with "Kelly" to get him to "shut up" for fear that he would be left to a damaging home life or end up in physical danger. The majority's assertion that Defendant "readily agreed to have oral and anal sex with 'Kelly' " and travelled to Lincolnton for that purpose is not supported by this evidence when considered in a light favorable to Defendant.

This Court has previously held a defendant presented evidence sufficient to merit an entrapment instruction where, according to his testimony, he first expressed disinterest in committing the criminal act but was later induced by acts of law enforcement that "involved emotional manipulation[,] including creating a false relationship and then taking advantage of the defendant's desire to maintain that relationship." *Foster*, 235 N.C. App. at 375, 761 S.E.2d at 215. Similarly, Defendant's testimony, considered in the light most favorable to him, establishes that he did not "readily" assent to engage in sex with "Kelly" as a person under the age of sixteen. Defendant testified in pertinent part:

> Sex was not on my mind at this time. The only thing [that] was on my mind was that this person was really going to go out and meet somebody else. Was he really without food? Was he really without clothes? Was he really in a situation where his aunt didn't want him? His parents are in prison. If all this is true, it's all the factors for danger.

We are required to accept as true Defendant's testimony that he did not intend to commit a crime prior to Detective Heavner's inducement and only agreed to commit the crime, to the extent he did so, once Detective Heavner "implant[ed] the criminal design." *State v. Salame*, 24 N.C. App. 1, 7, 210 S.E.2d 77, 82 (1974) (citation and internal quotation marks omitted).

B. Predisposition

I also disagree with the majority's conclusion that, viewed in the light most favorable to Defendant, the evidence shows he was predisposed to commit the crime charged absent inducement by Detective Heavner. The majority characterizes the evidence as showing that Defendant: (1) had a history of interacting with men on Craigslist; (2) invited three such men to live with him in his home, including a sixteen-year-old with whom he had sex; (3) continued to converse with "Kelly" after Detective Heavner disclosed his age; (4) promised to take care of "Kelly" and later agreed to have sex with him; and (5) acknowledged he had sex with men who previously lived with him in his home. As recounted *supra*, this view simply overlooks evidence favorable to Defendant.

Most notably, Defendant did not testify that he had ever hosted or engaged in sex with a sixteen-year-old in his home. Rather, he testified that more than three decades earlier, when he was nineteen and living in another state, he and a sixteen-year-old boy engaged in mutual fondling. Also, when considered in the light required by our precedents, Defendant's evidence shows that: (1) three adult men moved in with Defendant after meeting him on Craigslist, only one of whom had sex with Defendant; (2) Defendant has lived with four boyfriends, all over the age of eighteen, including the one he met on Craigslist;[6] (3) Defendant believed "Kelly" was seventeen, not fifteen, and immediately refused sex with "Kelly" if he was under eighteen; (4) Defendant's offer to "take care of 'Kelly' " did not necessarily include sex; and (5) Defendant agreed to have sex with "Kelly" not with the intent to have sex with him, but out of a concern that a refusal would leave "Kelly" in danger.

The evidence in this case is in stark contrast to *State v. Morse*, 194 N.C. App. 685, 671 S.E.2d 538 (2009), the authority relied upon by the majority. Although the majority correctly notes that the defendant in *Morse*, like Defendant here, "had previously engaged in sexually explicit communications with other users in adults only chat rooms and even met with one . . . to engage in sexual contact[,]" 194 N.C. App. at 692, 671 S.E.2d at 543, that was but one factor in a multi-faceted analysis by this Court:

> Furthermore, *defendant admitted that he had previously chatted with underage juveniles*. Defendant was familiar, not only with the ease with which an underage juvenile could access the adults only chat room, but also with the idea that other users can and often do falsely represent their names, age, and appearance. At trial, defendant *admitted that he had looked at baywatch142000's profile, which listed her age as "114" and included . . . "Actually 14."* Defendant testified, however, that he looked at the profile merely to view baywatch142000's photograph and thus initially overlooked her age. Defendant further contended that *he was not thinking about age at all, but rather was in a "sexual mindframe" when chatting with baywatch142000*.

6. I would not hold, as a matter of law, that a man's prior sexual experiences with consenting male partners, all above the age of consent, indicate that he is predisposed to engaging in sexual activity with a child.

> In spite of this testimony, defendant admittedly *did not hesitate to initiate sexually charged conversation* with baywatch142000 within the first few minutes of chatting, *or to begin making arrangements to meet for sexual contact*. Furthermore, *defendant did not*, *at any time during their chats*, *express reluctance to meet with baywatch142000*, *despite baywatch142000's repeated references to her age*. Baywatch142000 made it clear that she was a fourteen-year-old high school student, a virgin, and interested in finding an older friend in order to gain sexual experience. . . . *Throughout their chats*, *baywatch142000 was*, *for the most part*, *merely responsive to defendant's suggestions*, *while defendant took the more active role in both the sexually charged conversation and in planning their meeting*.

Id. at 692-93, 671 S.E.2d at 543-44 (emphasis added).

From that evidence, we determined that the defendant in *Morse* was not entitled to an entrapment instruction on his solicitation of a child charge, the same crime at issue in this case:

> Solicitation . . . elementally involves some impetus on defendant's part, rather than mere acquiescence. . . . Our precedent indicates that a trial court may properly refuse to instruct a jury on entrapment when defendant required little urging before acquiescing to requests by undercover officers. Here, the record contains ample evidence which tends to show that defendant did *more* than merely acquiesce and cooperate with a plan formed by police. . . . Such initiative goes far beyond the mere compliance, acquiescence in, or willingness to cooperate which is sufficient to show predisposition.

Id. at 693-94, 671 S.E.2d at 544 (citations and quotation marks omitted) (emphasis in original).

Here, unlike the defendant in *Morse*, Defendant did not have advance notice of "Kelly's" age when he responded to Detective Heavner's Craigslist ad; instead, Defendant initially believed "Kelly" was at least eighteen based on Craigslist's age verification requirement. Nor did the State present any evidence Defendant had ever before engaged in sexually explicit conversations with anyone underage; rather, Defendant unreservedly testified he had never done so. Also unlike the defendant in *Morse*, Defendant repeatedly stated his refusal to have sex with "Kelly"

once he suspected he was under eighteen. It was Detective Heavner, only after Defendant expressed that refusal, who reintroduced sex into the conversation; it was also Detective Heavner who repeatedly pressed Defendant to meet "Kelly."[7] Finally, Defendant testified "sex was not on my mind" when he agreed to meet "Kelly" after learning he was under eighteen, expressly disclaiming the "sexual mindframe" the defendant in *Morse* admitted to holding.

In short, *Morse* is distinguishable. Defendant's evidence, taken in the light most favorable to him, would allow a reasonable juror to infer that he was not predisposed to commit the crime for which he was convicted, and that he assented to Detective Heavner's plan after repeated denials and only when he believed the alternative would place "Kelly" in danger. Defendant was entitled to the entrapment instruction so the jury could evaluate and determine for itself whether Defendant was entrapped.

C. The Availability of the Defense

The State argues that Defendant could not claim the entrapment defense because he denied possessing the necessary criminal intent to convict him of soliciting a child. The majority does not address this argument; because I would vacate Defendant's conviction and remand for a new trial, I address this issue.

Both the State and Defendant cite *State v. Neville*, 302 N.C. 623, 276 S.E.2d 373 (1981), each asserting it supports their respective positions. In *Neville*, the defendant denied committing the acts alleged and was denied an entrapment instruction. 302 N.C. at 626, 276 S.E.2d at 375. Our Supreme Court rejected the defendant's argument that such a denial was error, holding "[t]he defense of entrapment presupposes the existence of the acts constituting the offense. Where a defendant claims he has not done an act, he cannot also claim that the government induced him to do that act." *Id.* (citations omitted). The Supreme Court distinguished denials of acts from denials of criminal intent, plainly rejecting the argument advanced by the State here: "[T]he entrapment

7. Detective Heavner first requested they meet before disclosing "Kelly's" age, a request that Defendant did not address. Detective Heavner again raised the issue after further conversation, asking "[s]o when ya wanna do this[?]" When Defendant did not respond to the question a second time, Detective Heavner reiterated "Kelly's" desire to meet immediately: "Look I am serious if [you are], I can leave[.] [A]ll I got to do is tell my aunt I found somewhere to go, she will be happy." Defendant responded that he was serious, to which "Kelly" replied "I really want to do this like today[.] . . . Seriously come get me[.]" It was at that point that Defendant offered to meet "Kelly" the following day.

defense is not inconsistent with the defense of lack of mental state since the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense." *Id.* (citation omitted); *see also State v. Sanders*, 95 N.C. App. 56, 61, 381 S.E.2d 827, 830 (1989) ("[A] defendant who denies an essential element *which deals with intent* but who admits committing the acts underlying the offense with which he is charged *may employ an entrapment defense*." (emphasis added)).

At trial, Defendant's counsel acknowledged he had admitted to committing the acts constituting the offense for which he was charged—*i.e.*, exchanging messages via computer regarding plans to engage in sex with "Kelly" and driving to Lincolnton to meet him. He only denies possessing the requisite criminal intent to engage in a sex act with a minor. Following *Neville* and *Sanders*, I would hold the State's argument on this question unavailing.

D. Prejudice

Defendant has demonstrated that the trial court's error in denying an entrapment instruction prejudiced him. Almost two hours into deliberations and after an initial request for reinstruction on the elements, the jury sent the following note to the trial judge: "Please define intent to have sex with a minor. Does it matter if the defendant's intent is to have sex when the boy is underage *or if his intent is to wait until—is to wait to have sex until the boy is of age?*" (Emphasis added). The trial court, during a hearing outside the jury's presence, told counsel that "what I would tell them is . . . it would not be a violation of the law to have intent to have sex after he's of age." When jurors returned to the courtroom, the trial court instructed them as follows: "It would constitute a violation of the law to have intent with a boy who is underage. It would not be a violation of the criminal code to . . . intend to have sex with someone who is not underage." Ten minutes later, the jury requested reinstruction on the elements of the crime charged. Four minutes after that reinstruction was given, the jury informed the trial court that it had reached a verdict, which resulted in this rather irregular dialogue:

> THE COURT: . . . You have a unanimous decision?
>
> THE FOREPERSON: We have made a decision.
>
> THE COURT: And is it a unanimous decision?
>
> THE FOREPERSON: It was not a unanimous decision.
>
> THE COURT: Okay. And is it by majority vote . . . ? Because the decision must be unanimous.

. . . .

THE FOREPERSON: Oh, it was unanimous.

THE COURT: Okay.

THE FOREPERSON: I'm sorry.

. . . .

THE COURT: . . . "Unanimous" meaning all 12 are in agreement with this decision?

THE FOREPERSON: No. No.

JURORS: No. No.

THE FOREPERSON: I think we are confused.

THE COURT: All right. . . . [T]he decision must be unanimous. If you have not completed your discussions, then we need to decide when you are coming back because we will be closing court this afternoon. There's no timetable. There's no—

THE FOREPERSON: We're done. I just—I think that maybe we are misunderstanding what you're trying to ask us.

THE COURT: Well, the decision of whether or not an individual is guilty or not guilty must be unanimous. Must be the decision that 12 believe guilty or 12 believe not guilty. That's what we mean by "unanimous."

THE FOREPERSON: Oh. Then, no, we are not unanimous.

THE COURT: Okay. Then I'm going to send you back to the jury room.

. . . .

So I'm not sure I understand where we are.

THE FOREPERSON: Everyone has made their own personal decision.

The trial court then reiterated the necessity of a unanimous decision but recessed court until the following morning. After more than an hour of deliberations the next day, the jury returned a unanimous verdict of guilty.

As noted above, Defendant admitted to the acts constituting the crime and only denied possessing the requisite criminal intent. With Defendant's mindset being the only element at issue before it, the jury's multiple requests for additional instructions on the elements—and specifically as to Defendant's intent—coupled with its apparent difficulty in arriving at a unanimous verdict demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443 (2017).

III. CONCLUSION

Respecting the limitations of appellate review, I dissent not because I conclude that Defendant has established the defense of entrapment, but because the law requires us to take his testimony to be true for the limited purpose of determining whether a jury might find that Defendant has proven that defense to its satisfaction.

Following controlling precedents, I would vacate Defendant's conviction and remand for a new trial.

STATE OF NORTH CAROLINA
v.
DANIEL YAIR MARINO

No. COA18-1135

Filed 21 May 2019

Jurisdiction—entry of final judgment on a Class D felony—after entry of prayer for judgment continued—jurisdiction not divested

Despite a nineteen-month delay in entering judgment on defendant's Class D drug trafficking conviction, the trial court's noncompliance with N.C.G.S. § 15A-1331.2—which prohibits a trial court from entering judgment more than twelve months after ordering a prayer for judgment continued (PJC) for a Class D felony—did not divest the trial court of jurisdiction to enter a final judgment in the case. By enacting section 15A-1331.2, the legislature intended to prevent trial courts from entering indefinite PJC's for high-level crimes rather than to limit the trial courts' jurisdiction if they violated the statute. Moreover, under common law principles, the trial court retained jurisdiction to enter its final judgment because it did

so within a reasonable period of time and defendant suffered no actual prejudice from the delay.

Appeal by Defendant from an Order entered 26 January 2018 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

This matter involves a Motion for Appropriate Relief (MAR) filed by Daniel Yair Marino (Defendant) on 25 October 2017, seeking relief from criminal convictions. The Record based upon the proceedings on the MAR below tends to show the following relevant facts:

On 16 September 2013, a Guilford County Grand Jury indicted Defendant for one count of Trafficking in Cocaine, a Class D felony; two counts of Trafficking in Marijuana, Class H felonies; one count of Possession with Intent to Sell or Deliver Marijuana, a Class I felony; and one count of Maintaining a Dwelling for the Keeping or Selling of Marijuana and Cocaine, a Class I felony. Pursuant to a plea arrangement, Defendant entered an *Alford* plea to the charged offenses on 11 June 2015. The terms and conditions of the parties' plea agreement provided:

> 1. That the charges shall be consolidated [under the Class D Trafficking in Cocaine charge] for judgment purposes.
>
> 2. That prayer for judgment shall be continued until on or after the criminal term beginning pursuant to [N.C. Gen. Stat. §] 90-95(h)(5). That the defendant agrees, if called upon by the State, to provide truthful testimony against any charged co-defendant in these matters.
>
> 3. That upon the State's prayer for judgment, the Court shall impose any additional terms deemed appropriate.

Approximately 19 months later, the State prayed for entry of judgment against Defendant. The trial court held Defendant's sentencing

hearing on 4 January 2017. At this hearing, the State and defense counsel were given the opportunity to present arguments regarding Defendant's sentence. The State informed the trial court that Defendant had provided the State with "substantial assistance" within the meaning of N.C. Gen. Stat. § 90-95(h)(5),[1] and Defendant's counsel urged the trial court to consider Defendant's efforts when sentencing Defendant.

After finding Defendant provided substantial assistance to the State, the trial court sentenced Defendant to an active term of a minimum of 48 months and a maximum of 70 months, and ordered Defendant to pay a $25,000 fine. This sentence was substantially lower than the sentence Defendant would have received had he not provided substantial assistance to the State, which the trial court acknowledged was a minimum of 175 months and a maximum of 222 months, plus a $250,000 fine. The written Judgment was entered on 6 January 2017; however, there was a clerical error in this Judgment, which was corrected by written Judgment on 27 February 2017.

On 25 October 2017, Defendant filed a MAR requesting the trial court set aside the sentence imposed on Defendant. According to Defendant's MAR, the trial court lacked jurisdiction to enter the sentence because of N.C. Gen. Stat. § 15A-1331.2, which requires the trial court enter final judgment on certain high-level felonies, including Class D felonies, within 12 months of the trial court entering a prayer for judgment continued (PJC). After hearing arguments from the State and defense counsel, the trial court issued an Order denying Defendant's MAR (MAR Order) on 26 January 2018. In its MAR Order, the trial court concluded Section 15A-1331.2 does not mention jurisdiction and that a violation of this statute does not divest the trial court of jurisdiction to enter judgment on a PJC after 12 months. Defendant petitioned this Court for a Writ of *Certiorari* to review the MAR Order. We granted Defendant's Petition for the purpose of granting Defendant an appeal. Defendant has prosecuted his appeal, and we now review the merits of his argument.

Issue

The sole issue on appeal is whether Section 15A-1331.2 of our General Statutes divested the trial court of jurisdiction to enter Judgment on Defendant's plea to Class D Trafficking in Cocaine.

---

1. N.C. Gen. Stat. § 90-95(h)(5) authorizes a trial court to deviate from the mandatory sentencing guidelines under Section 90-95 if the trial court finds the defendant provided the State with "substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals[.]" N.C. Gen. Stat. § 90-95(h)(5) (2017).

Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted). This Court has stated, "If the issues raised by Defendant's challenge to [the trial court's] decision to deny his [MAR] are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012) (first and third alteration in original) (citation and quotation marks omitted).

Here, Defendant challenges the trial court's MAR Order on legal rather than factual grounds, asserting that N.C. Gen. Stat. § 15A-1331.2 divested the trial court of jurisdiction to enter Judgment on Defendant's plea to Class D Trafficking in Cocaine. *See, e.g.*, *State v. Hayes*, ___ N.C. App. ___, ___, 788 S.E.2d 651, 652 (2016) ("Issues of statutory construction are questions of law which we review *de novo* on appeal[.]" (citation omitted)); *Powers v. Wagner*, 213 N.C. App. 353, 357, 716 S.E.2d 354, 357 (2011) ("This Court's determination of whether a trial court has subject matter jurisdiction is a question of law that is reviewed on appeal *de novo*." (citation and quotation marks omitted)). Therefore, we employ a *de novo* review.

Analysis

A. Background Law on PJCs

"Once a guilty plea is accepted in a criminal case, a trial court may continue the case to a subsequent date for sentencing." *State v. Watkins*, 229 N.C. App. 628, 631, 747 S.E.2d 907, 910 (2013) (citing *State v. Absher*, 335 N.C. 155, 156, 436 S.E.2d 365, 366 (1993)); *see also* N.C. Gen. Stat. § 15A-1334(a) (2017) (allowing "continuance of the sentencing hearing"); *id.* § 15A-1416(b)(1) (2017) (allowing the State to move for imposition of sentence when prayer for judgment has been continued). "This continuance is frequently referred to as a 'prayer for judgment continued' . . . [and] vests a trial judge presiding at a subsequent session of court with the *jurisdiction* to sentence a defendant for crimes

previously adjudicated." *State v. Degree*, 110 N.C. App. 638, 640-41, 430 S.E.2d 491, 493 (1993) (emphasis added); *see also Miller v. Aderhold*, 288 U.S. 206, 211, 77 L. Ed. 702, 705-06 (1933) ("[W]here verdict has been duly returned, the jurisdiction of the trial court . . . is not exhausted until sentence is pronounced, either at the same or a succeeding term." (citations omitted)).

Under our common law, a PJC may be for a definite or indefinite period of time, as long as it is entered "within a reasonable time"; otherwise, the trial court loses jurisdiction. *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493 (citation and quotation marks omitted). Our Supreme Court has clarified that "[a]s long as a prayer for judgment is not continued for an unreasonable period, . . . and the defendant was not prejudiced, . . . the court does not lose the jurisdiction to impose a sentence." *Absher*, 335 N.C. at 156, 436 S.E.2d at 366 (citations omitted). "Deciding whether sentence has been entered within a 'reasonable time' requires consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493 (citation omitted); *see also State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 133 (2003) (upholding as reasonable a sentence entered over five years after defendant was convicted).

B. N.C. Gen. Stat. § 15A-1331.2

In 2012, the Legislature enacted N.C. Gen. Stat. § 15A-1331.2, titled "Prayer for Judgment Continued for a Period of Time that Exceeds 12 Months Is an Improper Disposition of a Class B1, B2, C, D, or E Felony," which provides:

> The court shall not dispose of any criminal action that is a Class B1, B2, C, D, or E felony by ordering a prayer for judgment continued that exceeds 12 months. If the court orders a prayer for judgment continued in any criminal action that is a Class B1, B2, C, D, or E felony, the court shall include as a condition that the State shall pray judgment within a specific period of time not to exceed 12 months. At the time the State prays judgment, or 12 months from the date of the prayer for judgment continued order, whichever is earlier, the court shall enter a final judgment unless the court finds that it is in the interest of justice to continue the order for prayer for judgment continued. If the court continues the order for prayer for judgment continued, the order shall be continued for a specific period

> of time not to exceed 12 months. The court shall not continue a prayer for judgment continued order for more than one additional 12-month period.

N.C. Gen. Stat. § 15A-1331.2 (2017). Whether, and to what extent, N.C. Gen. Stat. § 15A-1331.2 imposes stricter jurisdictional requirements on a trial court for these high-level felonies than at common law presents a question of first impression for this Court.[2]

Here, Defendant's plea to a Class D felony and the trial court's 27 February 2017 Judgment unquestionably failed to comply with the requirements of N.C. Gen. Stat. § 15A-1331.2, which provides that if a trial court orders a PJC for a Class D felony, the trial court must include a condition that the State pray for judgment "within a specific period of time not to exceed 12 months." *See* N.C. Gen. Stat. § 15A-1331.2. Here, Defendant's plea agreement contained no such provision. Approximately 19 months after Defendant's conviction, the State prayed for judgment, and Defendant's Judgment was entered. No further order was entered during this 19-month time period continuing the case for up to the additional 12 months under the statute. As a result, the ultimate issue presented for our consideration in this case is whether the fact that Defendant's PJC failed to comply with the time-limit requirements set out in N.C. Gen. Stat. § 15A-1331.2 deprived the trial court of jurisdiction to enter Judgment against Defendant.

It is axiomatic that "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citation and quotation marks omitted). "The extent, if any, to which a particular statutory provision creates a jurisdictional requirement hinges upon the meaning of the relevant statutory provisions." *State v. Brice*, 370 N.C. 244, 251, 806 S.E.2d 32, 37 (2017) (citation omitted).

Under North Carolina law, "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "The best

---

2. *Watkins* represents the only published opinion from either of our appellate courts that mentions the statute in question; however, we did not address this statute's impact on our previous case law. 229 N.C. App. at 631 n.2, 747 S.E.2d at 910 n.2 ("[W]e do not reach the issue of how this statute affects the rules laid out in *Degree* and *Absher* as the statute [is inapplicable in this case].").

indicia of [the legislative] intent are the language of the statute . . . , the spirit of the act[,] and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

> If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls. Conversely, where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.

Mazda Motors v. Southwestern Motors, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (citations and quotation marks omitted). Although we generally construe criminal statutes against the State, "[a] criminal statute is still construed utilizing 'common sense' and legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *State v. Jones*, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004)); *see also Darby v. Darby*, 135 N.C. App. 627, 628, 521 S.E.2d 741, 742 (1999) ("[T]he courts in reading our statutes must import common sense to the meaning of the legislature's words to avoid an absurdity." (citation omitted)).

We acknowledge the language of N.C. Gen. Stat. § 15A-1331.2 is unambiguous in prohibiting a trial court from entering an indefinite PJC for these high-level crimes. However, nothing in Section 15A-1331.2 suggests its provisions should be construed as jurisdictional in nature. On its face, the statute in question fails to mention jurisdiction or any consequences for not adhering to its directives. We therefore must look to the Legislature's intent in enacting this statute to determine whether noncompliance strips the trial court of jurisdiction to enter final judgment. *See Brice*, 370 N.C. at 251, 806 S.E.2d at 37.

After reviewing the legislative history of this statute, which we acknowledge is scant, it is apparent that the purpose of Section 15A-1331.2 is to ensure those charged with the highest level offenses under our statutes do not escape punishment by receiving an indefinite PJC.[3]

3. The Bill creating this statute originated in the House of Representatives and read as follows:

> The court shall not dispose of any criminal action that is a Class B, C, D, or E felony by ordering a prayer for judgment continued that exceeds 12 months. If the court orders a prayer for judgment continued in any criminal action that is a Class B, C, D, or E felony, the court shall

By only limiting the trial court's ability to enter indefinite PJCs in the most serious offenses, the Legislature evinces an intent to expedite entry of final judgment for high-level crimes and guarantee that defendants convicted of these high-level crimes do not avoid sentencing for extended periods of time, which was and still is possible for defendants convicted of less serious offenses. *See, e.g.*, *State v. Pelley*, 221 N.C. 487, 496-98, 20 S.E.2d 850, 856-57 (1942) (upholding a delay of almost seven years between PJC and entry of final judgment).

Defendant contends a violation of Section 15A-1331.2 relinquishes the trial court of jurisdiction under the plain language of the statute, which used mandatory language. However, although the provisions of this statute are couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature. *See, e.g.*, *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978) (stating the words "must" or "shall" in a statute does not always "indicate a legislative intent to make a provision of the statute mandatory[] and a failure to observe it fatal to the validity of the purported action").[4]

> include as a condition that the State shall pray judgment within a specific period of time, not to exceed 12 months, and the court shall enter a final judgment at the time the State prays judgment or 12 months from the date of the prayer for judgment continued order, whichever is earlier.

H.R. 852, 2011 Gen. Assemb., Reg. Sess. (N.C. Apr. 6, 2011) (originally proposed bill). After passing a first reading in the House, this Bill was referred to the House Committee on Judiciary Subcommittee B, where it was amended to its current version. *See* H.R. 852, 2011 Gen. Assemb., Reg. Sess. (N.C. Apr. 27, 2011) (edition 2). The Minutes from this Subcommittee shed little light on the discussions regarding the changes to this Bill. *See Minutes of H. Comm. on Judiciary Subcomm. B*, 2011 Gen. Assemb., Reg. Sess. (N.C. Apr. 26, 2011).

When this Bill was read for the second time in the House, the sponsor of the Bill, Rep. Timothy Spear, and three other Representatives spoke in support of it, describing it as an attempt to ensure that a PJC is not a final disposition in these high-level felony cases and to be "tougher on crime." *See House Audio Archives*, 2011 Gen. Assemb., Reg. Sess. (Apr. 28, 2011), https://www.ncleg.gov/DocumentSites/HouseDocuments/2011-2012%20Session/Audio%20Archives/2011/04-28-2011.mp3 (remarks by Reps. Guice, Spear, Engle, and Faircloth at 3:59:00 to 4:05:00). These brief remarks constitute the only substantive discussions of this Bill. Eventually, the exact language of this Bill was placed in Senate Bill 707, which became law in 2012. *See* School Violence Prevention Act of 2012, 2012 N.C. Sess. Law 149, § 11 (N.C. 2012); *see also* 2012 N.C. Sess. Law 194, § 45.(e) (N.C. 2012) (recodifying Section 11 of Session Law 149 as N.C. Gen. Stat. § 15A-1331.2).

4. Our view of Section 15A-1331.2 is analogous to the treatment of N.C. Gen. Stat. § 7B-1109(e), which provides strict timelines for entry of orders in termination of parental rights proceedings. *See* N.C. Gen. Stat. § 7B-1109(e) (2017). This Court has recognized the failure to enter an order within the statutory timelines does not automatically result in the order being vacated. *See In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (2004). Our Supreme Court has further held the remedy to enforce these statutory timelines is

The effect of adopting the construction of N.C. Gen. Stat. § 15A-1331.2 espoused by Defendant, which would prohibit a trial court from entering judgment on an indefinite PJC after 12 months (or 24 months if either party obtains an extension) for our State's most serious offenses, cannot be squared with the likely legislative intent motivating the enactment of this statutory provision. *See Mazda Motors*, 296 N.C. at 361, 250 S.E.2d at 253 (holding where an interpretation of a statute would "contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control" (citations omitted)). As previously discussed, it is apparent our Legislature never intended that a violation of Section 15A-1331.2 would strip the trial court of jurisdiction to enter judgment on these high-level offenses. Because the intent of the Legislature controls, we hold that noncompliance with N.C. Gen. Stat. § 15A-1331.2 does not automatically divest the trial court of jurisdiction to enter a final judgment. *See id.* Rather, whether the trial court retained jurisdiction must be assessed using the standards set out in *Absher* and *Degree*.

Applying these principles, we hold the trial court's delay in sentencing Defendant was not unreasonable nor was Defendant prejudiced by this delay. First, the Record shows, and Defendant concedes, that Defendant did not object to the trial court's PJC entered upon Defendant's *Alford* plea, and thereafter Defendant never requested the trial court enter judgment on his conviction. His failure to do either is "tantamount to his consent to a continuation of" judgment during that time period. *Degree*, 110 N.C. App. at 641-42, 430 S.E.2d at 493. Secondly, the length of Defendant's delay, approximately 19 months, is well within the range of delays previously upheld by our courts. *See Pelley*, 221 N.C. at 496-98, 20 S.E.2d at 856-57 (approximately seven-year delay upheld); *see also Lea*, 156 N.C. App. at 180, 576 S.E.2d at 133 (five-year delay upheld); *State v. Mahaley*, 122 N.C. App. 490, 491-93, 470 S.E.2d 549, 550-52 (1996) (four-year, six-month delay upheld).[5]

Lastly, Defendant suffered no prejudice as a result of this delay. The purpose for Defendant's PJC was to allow Defendant time to provide

---

through *mandamus*. *In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008) ("In cases such as the present one in which the trial court fails to adhere to statutory time lines, mandamus is an appropriate and more timely alternative than an appeal.").

5. We further note had (1) Defendant's plea agreement included a condition that the State pray for judgment within a specific period of time not to exceed 12 months and (2) the State moved for an additional 12-month continuance within the first 12-month period, the 19-month period in this case would have complied with the statutory requirements of Section 15A-1331.2. *See* N.C. Gen. Stat. § 15A-1331.2.

substantial assistance to the State in accordance with his plea agreement. Because of this delay in sentencing, Defendant was able to provide substantial assistance, and as a result, Defendant received a significantly lower sentence than he would have had he not been able to provide assistance to the State. Further, Defendant does not argue he was prejudiced in any way by the trial court's failure to enter judgment within 12 months.

Accordingly, we hold that the Judgment was entered within a reasonable period of time and that Defendant suffered no actual prejudice thereby. Because the trial court did not lose jurisdiction to enter Judgment against Defendant, the trial court correctly denied Defendant's MAR.

Conclusion

For the foregoing reasons, we conclude the trial court retained jurisdiction to enter Judgment on 27 February 2017. Therefore, we affirm the trial court's MAR Order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

STATE OF NORTH CAROLINA
v.
GREGORY K. PARKS

No. COA18-520

Filed 21 May 2019

1. Evidence—expert opinion—forensic pathologist—inference from blood loss—Rule 702—reliability

In a murder prosecution, the trial court properly exercised its discretion in allowing opinion testimony from two forensic pathologists who stated that the amount of blood found in defendant's house was consistent with blood loss from an injury to the victim (whose body was never found) severe enough to cause death absent immediate medical attention. The opinions were sufficiently reliable where the experts drew on their experience to compare the information from this case to numerous other cases—a common method used in forensic pathology—in order to form a medical opinion.

2. Constitutional Law—motion to suppress—evidence collected under search warrant—supporting affidavit—truthfulness

Defendant was not entitled to the suppression of evidence collected from his house as part of a murder investigation where evidence supported at least some version of each statement contained in the affidavit accompanying the search warrant, and defendant failed to show the affiant acted in bad faith or in reckless disregard of the truth.

3. Homicide—first-degree—sufficiency of evidence—victim's body not found

In a trial for the killing of a victim whose body was never found, the State's evidence, though circumstantial, was sufficient to support a reasonable inference of defendant's guilt of first-degree felony murder, kidnapping, and obtaining property by false pretenses to survive defendant's motion to dismiss. The victim was last seen with defendant at defendant's house before she disappeared, the victim's blood was found in defendant's house in a quantity which suggested a serious injury requiring immediate medical attention, defendant removed blood-stained carpet from his home, he was in possession of the victim's ring which had blood on it, and his explanations to law enforcement changed over time.

Judge MURPHY concurring in a separate opinion.

Appeal by defendant from judgments entered 15 November 2017 by Judge Wayland J. Sermons, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Marilyn G. Ozer for defendant.

ARROWOOD, Judge.

Gregory K. Parks ("defendant") appeals from judgments entered upon his convictions for first degree murder, obtaining property by false pretenses, and obtaining habitual felon status. For the following reasons, we affirm.

I. Background

A warrant for defendant's arrest was issued and defendant was arrested on 19 August 2015 for the first degree murder and first degree kidnapping of Isabel Calvo Palacios, who was last seen on 31 July 2015. A Wilson County Grand Jury indicted defendant on one count of first degree murder and one count of first degree kidnapping on 12 October 2015. On 11 January 2017, the Grand Jury additionally indicted defendant for obtaining the status of a habitual felon and on one count of obtaining property by false pretense.

Pretrial hearings took place in Wilson County Superior Court before the Honorable Wayland J. Sermons, Jr., on 5 and 19 October 2017 to address the many procedural and evidentiary motions filed by the parties, including motions by defendant to exclude expert opinion testimony and motions to suppress evidence. The case was then tried in Pitt County Superior Court before Judge Sermons between 23 October 2017 and 15 November 2017.[1]

The evidence at trial tended to show that Palacios, a 20-year-old-woman, went to defendant's house on the night of 30 July 2015 to do drugs with defendant. Except for leaving with defendant several times to obtain cocaine, Palacios spent the night of 30 July 2015 and the early morning hours of 31 July 2015 smoking crack cocaine with defendant at defendant's house. During that same time period, Ronald Parker was exchanging text messages with Palacios about meeting to hang out and smoke weed together. Sometime between 3:00 and 5:00 a.m. on 31 July 2015, Parker arrived at defendant's house. Only Palacios' vehicle was in the driveway. Palacios responded to Parker at the door under the carport, but Palacios was unable to let him in because the deadbolt on the door was locked and could only be opened with a key. Parker testified that Palacios was locked in the house. Parker asked Palacios if she wanted to get out but she said she didn't. Parker then left and came back later on Palacios' instructions.

Parker returned between 5:00 and 6:00 a.m. before the sun had risen. Both Palacios' and defendant's vehicles were in the driveway. There were also two men, referred to as Black and Harold, outside of defendant's house. Defendant stated that the men were trying to collect. Defendant called police about the men, but because Palacios did not want to be involved with the police, she exited the house and got

1. Both defendant and the State filed motions for change of venue, which the trial court previously granted on 13 July 2017.

into Parker's vehicle. Parker and Palacios drove around until defendant notified them that it was all clear. When they returned to defendant's house, defendant let them in through the door under the carport and locked the deadbolt as he closed the door behind them. Parker recalled that Palacios and defendant were smoking crack cocaine in the bedroom on the left-hand side of the hallway. Parker and Palacios then went into another bedroom across the hallway, smoked marijuana, and had sex. After they were finished, Palacios left the bedroom and Parker slept in the room for approximately four hours until Palacios and defendant woke him up around 10:00 a.m. Parker left approximately 30 minutes later through the carport door; defendant let him out and locked the deadbolt after he left. There was a baseball bat inside the house behind the door.

Parker drove around that afternoon smoking and selling marijuana with his cousin, Matthew Jones. They drove by defendant's house several times and Parker thought it was unusual that Palacios' vehicle was still there because Palacios had a little daughter that she usually went home to. At 2:45 p.m., Parker called Palacios. Parker testified that "[a]s soon as it rung she answered and she was screaming for her life, help, help; somebody help me please; he's hurting me; he's hurting me; he's hurting me. . . . I heard a man which I think was [defendant] got on the phone and said, we was just playing; she's all right; she's all right, and they hung the phone up." Parker drove around for a couple more hours and continued to call Palacios; those calls went straight to voicemail.

Parker and his cousin later went back to defendant's house to check on Palacios. Palacios' vehicle was still there. Parker got out, knocked on the door, and spoke to defendant through the door. Defendant told Parker that some Mexican guys took Palacios. Parker then walked around the back of the house and noticed a broken window and stains on the curtain that Parker said "looked like to me would be blood, smear stains." Parker called 911 at that time and told the operator about the earlier phone call when he heard Palacios screaming, that Palacios' vehicle was still at defendant's house but defendant said she was not there, and that they noticed a busted out window with blood at the back of the house. Parker and his cousin did not wait for police because they were high and had marijuana on them.

Two Wilson police officers, Edwards and McKenzie, responded to the 911 call and arrived at defendant's house just before 6:00 p.m. on 31 July 2015 to do a welfare check. Defendant let the officers inside and they spoke with defendant in the kitchen area. Defendant told the officers that Palacios left with a Hispanic guy in a pickup truck. Defendant

also told the officers that Palacios left her vehicle there because it was running hot. While the officers were talking with defendant, Parker and his cousin returned and Officer Edwards stepped outside to speak with them. Parker said that he told the officer that Palacios was missing and showed them the busted out window and what he thought was blood. Officer McKenzie, who remained inside, asked defendant if they could look around to make sure Palacios was not there. Defendant agreed and, after Officer Edwards came back inside, led the officers through the house allowing them to look in the rooms. It was not a thorough search; they were not "pulling up, getting on the ground, looking under beds or anything like that, just looking in rooms making sure we didn't see anyone." They were not looking for blood evidence or any other kind of evidence. Officer McKenzie recalled there was carpet in the bedroom on the left-hand side of the hallway and that a broken window in the bedroom was covered. Defendant told the officers that earlier that day, someone tried to break into his house so he broke the window in an attempt to get out of the house. Officer McKenzie also noticed bedding soaking in the hallway bathtub. Once the officers exited defendant's house, they spoke with Parker. The officers walked around the back of the house and noticed the broken window. The officers, Parker, and Parker's cousin then left.

Later that same evening, at approximately 10:40 p.m., Parker returned to defendant's house with some guys from Palacios' neighborhood to look for Palacios. Palacios' vehicle was still at defendant's house. Both defendant and one of the guys with Parker separately called 911. Two Wilson police officers, Harrison and Sherrill, responded to the call between 10:45 p.m. and 11:00 p.m. Officer Harrison spoke with the guys outside while Officer Sherrill spoke to defendant inside defendant's house. Officer Sherrill asked defendant where Palacios went and defendant told him that "she had lost her keys and that she had left looking for them." Defendant again walked with the two officers around the house as they performed a welfare check looking for Palacios. The officers looked everywhere they thought a human being could be: in bedrooms, bathrooms, closets, under beds; they were not looking for other evidence. Officer Sherrill recalled that there was red carpet in the bedroom on the left-hand side of the hallway. The officers told the men outside that Palacios was not in the house, and everyone left.

Both sets of officers who responded to 911 calls on 31 September 2015 noted that defendant was cooperative and calm. The officers also recalled that defendant never mentioned Palacios bleeding in his house, or that he found Palacios' keys.

The following morning, on 1 August 2015, defendant picked up Shannon Dunn to smoke crack cocaine. They went and got a crack rock, went back to Dunn's house, and then went to "Quick Pawn," a pawn shop on Tarboro Street. Dunn waited in the car as defendant went inside and pawned a 10 karat gold cluster ring for $25.00 in cash. The ring was later identified as a ring given to Palacios in July 2015 and testing on the ring was positive for blood and Palacios' DNA. After pawning the ring, defendant and Dunn got a second crack rock and went to defendant's house. Defendant locked the deadbolt on the door under the carport behind them and they went back to the bedroom on the left-hand side of the hallway to smoke crack. Dunn recalled that the bedroom stunk and defendant told her a woman threw up in the room the night before. Dunn testified that she wanted to pick up pieces of the crack rock from the floor after defendant broke the rock, but defendant did not want her on the floor. Defendant told her there was glass on the floor. Dunn also testified that defendant did not want her to use the hallway bathroom. Defendant and Dunn spent all of 1 August 2015 searching for and smoking crack cocaine. On 2 August 2015, defendant called Dunn to ask if her brother would help him put down new carpet. Defendant told Dunn that he had been up all night tearing the carpet out of the bedroom because he was tired of cutting his feet on glass in the carpet.

At approximately 1:00 p.m. on 4 August 2015, Detective Tant of the Wilson Police Department went to defendant's house to follow up on a missing person's report for Palacios. Defendant arrived minutes after the detective arrived and invited the detective into the house. They spoke inside in the kitchen area. Defendant told the detective that he and Palacios smoked crack cocaine together and that she left to go find money but could not find her keys. Defendant never mentioned that Palacios cut her foot at his house. Detective Tant testified that he told defendant they would do whatever it takes to find Palacios and at that moment, defendant "started shaking so hard that he had to set [a] cup down before he dropped the cup."

Defendant voluntarily went to the Wilson Police Department main office around 4:45 p.m. on 4 August 2015. Detective Godwin of the Wilson Police Department interviewed defendant. Defendant told Detective Godwin about smoking crack cocaine with Palacios on 30 and 31 July 2015 and that Palacios left around 2:30 p.m. on 31 July 2015. Defendant stated that Palacios lost her keys and that is why her vehicle was still there, which detective Godwin noted was different from what defendant initially told Officer McKenzie. When specifically questioned, defendant stated that he tried to have sex with Palacios but he could not

get an erection. After initially stating police would find no blood in his house, defendant shifted his story and said they may find a small amount of Palacios' blood from stepping on glass. Defendant also stated that he broke the window at his house while trying to get out of the window when Black and Harold were at his house on 31 July 2015. Detective Godwin did not notice any injuries to defendant's hands. Defendant did not mention to Detective Godwin that he had removed carpet from his house or that he had cleaned blood from his house.

That same evening following the interview, on 4 August 2015, a search warrant was obtained and executed on defendant's house. Defendant's house was seized for purposes of the search and defendant never returned to the house. Defendant was cooperative at the time.

During the search of defendant's house, it was discovered that defendant had removed the carpet from the bedroom on the left-hand side of the hallway. Red carpet fibers were found leading from the door under the carport onto the driveway and in the trunk of defendant's vehicle. The carpet padding was discovered in a trashcan outside of defendant's house and tests on the padding were positive for blood with Palacios' DNA. A candlestick, a lamp, and a bath mat were also found in a trashcan outside of defendant's house and they tested positive for blood and Palacios' DNA. Blood spots or spray with Palacios' DNA were discovered inside defendant's house on several walls in the bedroom on the left-hand side of the hallway, the deadbolt lock on the bedroom door, pieces of flooring, and on a window. A shirt, clothes hamper, newspaper, and ashtray recovered from defendant's house also tested positive for blood and Palacios' DNA. Palacios' car keys were found behind a statue figurine on a built-in bookcase between the kitchen and living room area. Cleaning supplies including Ammonia, bleach and carpet cleaner were also discovered during the search. The baseball bat seen in defendant's house was never recovered.

When detectives took medicine to defendant on 6 August 2015 at the motel the police department put him in, they asked defendant about the carpet. Defendant said he put the carpet in his trunk and took it down to a corner where people drop stuff off. Detectives did not find carpet fibers at the corner identified by defendant and were never able to locate the carpet.

During an interview of defendant on 19 August 2015, after defendant was arrested and charged, defendant told detectives for the first time that he noticed blood in his house on the afternoon of 31 July 2015 and that he cleaned up the blood. Defendant also claimed to detectives

for the first time that Palacios had smoked marijuana laced with another drug and cut her hand near the broken window. Defendant asked questions to detectives about the amount of blood discovered in his house after the detectives mentioned luminol was used to find blood evidence. Defendant specifically asked if they "found eight pints of blood in his house[,]" while indicating that he knew the human body had eight pints of blood. When questioned whether Palacios was killed in the bedroom, defendant indicated that she could have been because anything is possible; but he did not know about it.

Defendant also admitted to detectives that he traded drugs for sex from girls that came to his house; and that he felt he was justified in hitting the girls if they did not uphold their end of the bargain. The State presented evidence under Rule 404(b) that defendant had been violent with a number of women in the past who had used drugs with defendant and refused sex.

Palacios was never found despite extensive search efforts by foot, vehicle, helicopter, dogs, dive teams, and internet. No one, including Palacios' family, has heard from Palacios since 31 July 2015. There were, however, several possible reported sightings.

At the close of the State's evidence, defendant moved to dismiss the first degree murder charge, the first degree kidnapping charge, and the obtaining property by false pretense charge. The trial court found insufficient evidence of premeditation and deliberation to allow the State to proceed on that theory of first degree murder; but found sufficient evidence to allow the State to proceed on the theory of first degree felony murder. The trial court also found sufficient evidence to support the first degree kidnapping and obtaining property by false pretense charges. Therefore, the trial court denied defendant's motion to dismiss.

On 15 November 2017, the jury returned verdicts finding defendant guilty of first degree felony murder by the commission of attempted second degree rape and by the commission of second degree kidnapping, first degree kidnapping, obtaining the status of an habitual felon, and obtaining property by false pretense. The trial court arrested judgment on the first degree kidnapping conviction, entered a judgment on the first degree felony murder conviction sentencing defendant to life imprisonment without parole, and entered a judgment for obtaining property by false pretense and obtaining habitual felon status sentencing defendant to a consecutive term of 128 to 166 months imprisonment to begin at the expiration of the life sentence. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant challenges the trial court's admission of expert testimony, the trial court's denial of a motion to suppress, and the trial court's denial of a motion to dismiss the charges.

1. Expert Testimony

[1] Defendant first contends the trial court erred in allowing two forensic pathologists to testify as to their expert opinions regarding the amount of blood discovered in defendant's house. Defendant asserts that the trial court's decision to allow their testimony was improper under Rule 702.

It is the trial court's role to decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2017). "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). However, "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008).

Rule 702 of the North Carolina Rules of Evidence governs testimony by experts. Pertinent to defendant's argument, the rule currently provides as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2017).

In *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016), our Supreme Court discussed Rule 702 at length. The Court first explained the history of Rule 702 of the Federal Rules of Evidence and how an amendment to Federal Rule 702 adopted in 2000 incorporated the exacting standards of reliability established in the United States Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). *McGrady*, 368 N.C. at 884-85, 787 S.E.2d at 6. The Court in *McGrady* then explained that, although the original text of North Carolina's Rule 702 and the original text of Federal Rule 702 were largely identical, judicial construction of North Carolina's Rule 702 took a different path with our courts initially concluding that " 'North Carolina is not, nor has it ever been, a *Daubert* jurisdiction' " and noting that North Carolina has adopted a less mechanistic and rigorous approach than the federal approach. *McGrady*, 368 N.C. at 886, 787 S.E.2d at 6-7 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004). However, in 2011, the General Assembly amended North Carolina's Rule 702 to incorporate the three reliability requirements now at the end of Rule 702(a) by adopting language virtually identical to the 2000 amendment to the federal rule. *McGrady*, 368 N.C. at 887, 787 S.E.2d at 7; *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a). The Court explained in *McGrady* that "[b]y adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well. In other words, North Carolina's Rule 702(a) now incorporates the standard from the *Daubert* line of cases." *Id.* at 888, 787 S.E.2d at 7-8. Thus, "the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *Id.* at 884, 787 S.E.2d at 5.

Upon establishing that North Carolina now followed the *Daubert* standard, the Court explained that "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (footnote omitted). First, the relevance inquiry requires that "the area of proposed testimony must be based on 'scientific, technical or other specialized knowledge' that 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Id.* (quoting N.C.R. Evid. 702(a)). Second, the witness must be competent to testify as an expert in the field of the proposed testimony; that is "the witness must be 'qualified as an expert by knowledge, skill, experience, training, or education.' " *Id.* at 889, 787 S.E.2d at 9. Third, "the testimony must meet the three-pronged reliability test that is new to the amended rule [included in subsections (1) through (3) of Rule 702(a)]." *Id.* at 890, 787 S.E.2d at 9.

As stated above, in this case defendant specifically challenges the trial court's admission of expert opinion testimony from two forensic pathologists concerning the amount of blood discovered in his house.

The expert testimony was brought to the attention of defendant when the State filed supplemental discovery and notices of expert witnesses on 2 October 2017. The notices indicated the State would call two forensic pathologists to testify to an opinion they reached in a report prepared jointly with a third forensic pathologist after a two-hour meeting with the detectives and the assistant district attorney, during which the pathologists reviewed photographs of the blood evidence discovered in defendant's residence, including photographs of a blood stain on carpet padding removed from a bedroom, reviewed SBI lab reports, and discussed the crime scene with detectives. The opinion the State sought to introduce from the report was that Palacios suffered injuries that caused her to bleed in defendant's home and the amount of blood lost, given her small size, was sufficient to cause her death and would have caused her death if she did not receive immediate medical attention.

On 4 October 2017, defendant filed a motion *in limine* to exclude the opinion testimony of the pathologists on the basis that the testimony was improper under *Daubert* and *McGrady*. The motion *in limine* was first addressed before the trial court at the pretrial hearing on 5 October 2017. At that time, defense counsel argued there was nothing showing the experts had conducted any testing or done anything to qualify them to testify about the blood. Defense counsel remarked, "[j]ust because you're a pathologist doesn't mean you can step out here and all of a sudden talk about quantification and [the] amount of blood you see at a scene through photographs and hear somebody tell you about what color blood it is." Upon hearing defendant's concerns, the trial court indicated it would conduct a pretrial hearing on the qualifications of the State's expert witnesses after jury selection but before the witnesses testify.

That pretrial hearing was held on 24 October 2017, at which time the trial court considered the *voir dire* testimony of the State's expert witnesses, Dr. M.G.F. Gilliland and Dr. Karen L. Kelly, and considered arguments. Noting defendant's objection, the trial court announced its decision in open court as follows:

> In this case I'm going to rule that the exact language of the opinion as contained in the August – or October 2nd, 2017 written opinion does go beyond the scope of *Daubert* in its last sentence. However, I am going to find that the experts may testify that based upon their training and experience

> the amount of blood loss observed in the crime scene information in this case is significant -- I'm going do [sic] let them say that -- it is consistent with other amounts of blood loss in cases which the victim would require immediate medical attention to survive. And that's as far as I'm going to let them go.

Thereafter at trial, in addition to offering unchallenged testimony regarding blood evidence found in different areas and on different objects in defendant's house, the trial court allowed Dr. Gilliland and Dr. Kelly to testify, over defendant's objections, to their opinions as to the amount of blood. Dr. Gilliland testified that based on all the evidence that she saw in this case, and based on her prior training and experience, she was able to form a medical opinion in this case. Dr. Gilliland then testified, "[m]y opinion is that based on the amount of blood loss that I estimated[,] that this individual had suffered a significant blood loss. . . . In my opinion individuals who have suffered this kind of blood loss are in need of medical attention." Dr. Gilliland further testified that she has been involved in cases in the past where she has seen individuals with similar amounts of blood loss and those victims had required immediate medical attention. Dr. Kelly similarly testified, "[s]o with all the things that we have seen and the presence of the stain in the padding, it's my opinion that there was a significant amount of blood present at the scene." Dr. Kelly then stated, "[b]ased on my training and experience at scenes of death[,] that there was a significant amount of blood at the scene and that it's consistent with other scenes that I have seen in the past, and that if the victim had not received, that the victim would have required medical attention very quickly."

Just as defendant argued below, defendant now argues that the admission of this expert opinion testimony was improper under *Daubert* and *McGrady* because the testimony violated every reliability requirement for admission under Rule 702. Defendant does not challenge the relevance of the testimony or the qualifications of the witnesses. Defendant only contests the reliability.

As noted above, the three-pronged reliability test added to North Carolina Rule 702 by the 2011 amendment requires all of the following: "(1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3). Relying on *Daubert*, *Joiner*, and *Kumho*, the Court explained in *McGrady* as follows:

> The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate. However, conclusions and methodology are not entirely distinct from one another, and when a trial court conclude[s] that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

McGrady, 368 N.C. at 890, 787 S.E.2d at 9 (citations and quotation marks omitted). The Court further pointed out that cases have "articulate[d] particular factors that may indicate whether or not expert testimony is reliable" and that, "[i]n its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3)." *Id.*

In arguing the admission of the testimony violated every reliability requirement of Rule 702(a), defendant points to many of those factors identified in *McGrady*. It is clear from the pathologists' *voir dire* testimony that their opinions on the amount of blood loss were not based on published reports, were not subject to peer review, and had not been tested for a potential rate of error. One of the pathologists explicitly agreed with the court that the opinion was "not based on any type of peer review authorized formulas, extrapolations or anything that can be objectively quantified and tested and held up against other researches who may have different opinions[.]" It is also clear that the pathologists' opinions in this case were formed specifically for the purpose of litigation and based on information gathered during the meeting with detectives and the assistant district attorney.

However, even with these factors generally weighing against the admission of expert testimony, we are mindful that

> [t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test. The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant testimony is reliable.

McGrady, 368 N.C. at 890, 787 S.E.2d at 9 (citations and quotation marks omitted) (emphasis in original).

Here, it is evident that the trial court understood the reliability requirements and limited its decision to allow the testimony based on the type of testimony being offered and nature of the pathologists' work. We hold it was within the trial court's discretion to do so.

The court specifically explained to the witnesses that "the inquiry of the [c]ourt is that the methodology that you used in coming up with your opinions have to be based on reliable data and scientific methods[,]" and expressed concern that the opinion in the report that the State sought to admit was a subjective opinion "about somebody with this amount of loss that we observed would have died." The court directly acknowledged defendant's concern that the pathologists could not quantify the amount of blood loss in volume from crime scene photographs and questioned the State about how the opinion testimony based on experience was admissible after "*Daubert* . . . tightened up [the] requirement that opinions be based upon reliable, scientific methods . . . ." The trial court indicated it was having trouble with the opinion testimony that Palacios would have died from the blood loss, but believed it was proper for the pathologists to testify that the blood loss was "consistent" with blood loss observed in other cases where the person suffering the blood loss would have died without immediate medical attention. The court explained that the difference between the two opinions was that the opinion comparing the blood loss to other cases was clearly based upon the training and experience of the pathologists.

In response to the trial court's questions, the defense argued that the problem with the opinion the State sought to admit was that the "opinion goes too far. It is beyond what they should and could be able to testify to." Defendant, however, acknowledged that the pathologists could testify to what they see and that our law "seems to allow language in questions being asked to experts about something being consistent. That question would be closer to allowing them to answer that question than it would be to receive an opinion such as what [the State sought to admit from the report.]"

As shown in the trial court's decision, set forth above, the court refused to allow the pathologists to testify to the opinion the State sought to admit from the report, holding that the opinion went beyond the scope of *Daubert*. The trial court instead limited the pathologists' opinion testimony to comparing the blood loss in this case to blood loss in other cases, which the defense accepted was more proper.

We agree with the trial court that the opinion testimony allowed into evidence is in line with the nature of forensic pathology work. While the

pathologists are trained medical doctors and educated on the amount of blood in a human body and statistics for blood loss, the pathologists testified that that information served only as a base of knowledge from which they must use their training and experience as doctors and forensic pathologists. The pathologists testified that it is impossible to measure the amount of blood, in terms of volume, at a crime scene; therefore, they did not provide any numbers to quantify the amount of blood loss in this case. Instead, the pathologists explained that doctors are trained to look at blood loss, compare different amounts, and determine if medical attention is needed; and as a forensic pathologist, they have dealt with many cases involving the determination of whether blood loss was a cause of death.

Here, the pathologists' testimony was based on photographs of the crime scene, SBI lab results, and discussions with the detectives involved in the case. Without objection, the pathologists testified on the blood evidence discovered in defendant's house based on what they observed in the photographs and lab reports, and discussed with detectives. The pathologists testified that it was routine in the field of forensic pathology to rely on such data and information from other sources and that they use photographs a couple hundred times each year to form medical opinions. The testimony was that it was less common for them to actually go to a crime scene because of the large area that their office covers. The pathologists also explained how they compare the data and observations with what they have experienced at other crime scenes to form an opinion. Both pathologists testified that it was common in the field of forensic pathology to form opinions based on comparisons with other cases and acknowledged they deal with blood loss and render opinions as to a cause of death on a daily basis. Testimony was given that it was "absolutely" a normal part of forensic pathology to determine if someone has died or needed medical attention as a result of blood loss. Dr. Kelly added that experience is an accepted form of methodology in the field of forensic pathology.

Both pathologists in this case testified that they have been involved in hundreds of cases where they have had to look at crime scene photographs of blood and a body, to which they could compare the data and observations in this case. Based on their experience, the pathologists responded to the trial court's inquiry that they were able to testify that the amount of blood in this case would be consistent with a person who would need immediate medical attention. Dr. Gilliland added that her opinion was to a reasonable degree of medical certainty.

Upon review of the *voir dire*, we hold the trial court understood the reliability standard and properly formulated a test in this case to judge the reliability of the pathologists' opinion testimony based on the nature of that testimony. That inquiry showed that the pathologists' testimony was based on the facts and data typically relied on in the field of forensic pathology, and that the pathologists compared the information presented to hundreds of other cases which they have seen to form an opinion that the blood loss in this case was significant. Thus, we hold the trial court properly determined that the pathologists' testimony was based on sufficient facts or data, was the product of reliable principles and methods, and that they reliably applied those principles and methods in this case. The trial court did not abuse its discretion in this case in admitting the limited opinion testimony of the pathologists.

Moreover, we emphasize that the only testimony that defendant challenges is the pathologists' opinions that the amount of blood loss was consistent with blood loss in other cases where the victim required immediate medical attention. Defendant does not challenge the admissibility of the pathologists' testimony as to what they observed in the crime scene photographs. That evidence was properly admitted and put before the jury. It is not clear to this Court that, even if the opinion testimony was improper, that the testimony would rise to the level of prejudice requiring a new trial given the other evidence in the case.

2. Motion to Suppress

[2] Defendant next claims that the trial court's denial of his motion to suppress violated his constitutional rights against unreasonable search and seizure. Defendant filed numerous motions to suppress on 4 October 2017, but now specifically challenges the denial of his motion to suppress evidence collected during the search of his residence pursuant to the warrant issued on 4 August 2015. Defendant contends evidence collected during the search must be suppressed because the search warrant was issued based on an affidavit containing false and misleading information.

In *Franks v. Delaware*, the United States Supreme Court addressed whether "a defendant in a criminal proceeding ever [has] the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant[.]" 438 U.S. 154, 155, 57 L. Ed. 2d 667, 672 (1978). The Court recognized that "[t]here is . . . a presumption of validity with respect to the affidavit supporting the search warrant[,]" *id.* at 171, 57 L. Ed. 2d at 682, but held that,

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56, 57 L. Ed. 2d at 672. In reaching its holding, the Court emphasized that the Fourth Amendment requirement of a showing of probable cause is premised on the assumption that there will be a "*truthful* showing," *id.* at 164-65, 57 L. Ed. 2d at 678 (emphasis in original); but explained that

> [t]his does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Id. at 165, 57 L. Ed. 2d at 678.

Applying the analysis set forth in *Franks* in *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), our Supreme Court explained that

> [u]pon any evidentiary hearing, the only person whose veracity is at issue is the affiant himself. A claim under *Franks* is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

Fernandez, 346 N.C. at 14, 484 S.E.2d at 358 (citations omitted). As our courts have recognized, N.C. Gen. Stat. § 15A-978 codifies the rule enunciated in *Franks* and provides, in pertinent part, as follows:

> (a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

N.C. Gen. Stat. § 15A-978(a) (2017).

In defendant's motion to suppress, defendant went through each paragraph of the affidavit submitted in the search warrant application and took issue with certain statements. The trial court heard and denied defendant's motion to suppress on 19 October 2017, and later filed a written order on 13 November 2017. In the order, the trial court addressed each of defendant's assertions, but found that only one paragraph in the affidavit could not be considered for issuance of the search warrant. The trial court further found that the defendant's other allegations were simply disagreements with the averments made in the affidavit and determined that, with the exclusion of the one paragraph that could not be considered, the remainder of the affidavit was sufficient to support the necessary finding of probable cause to issue the search warrant.

Now on appeal, just as defendant did below, defendant identifies statements in the affidavit that he contends are false or unrelated to the case, and identifies omissions from the affidavit that he asserts were misleading. Defendant, however, does not specifically attack the veracity of the affiant; defendant simply asserts that given the number of false or misleading statements and the misleading omissions, "the only possible conclusion is that the affidavit was written with reckless disregard for the truth or because the officers acted in bad faith . . . ." Upon review of the evidence, we are not convinced.

Although not all statements in the affidavit are entirely accurate, the evidence supports some version of those challenged statements and defendant has not met his burden to establish by the preponderance of the evidence that the affiant made those statements in reckless disregard to the truth or in bad faith. *See State v. Haymond*, 203 N.C. App. 151, 159, 691 S.E.2d 108, 117 (2010) ("[A] defendant must 'establish facts

from which the finder of fact might conclude that the affiant alleged the facts in bad faith.' He cannot rely on evidence that merely 'contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements.' ") (quoting *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358). Thus, the trial court did not err in denying defendant's motion to suppress.

3. Motion to Dismiss

[3] In the final issue on appeal, defendant contends the trial court erred in denying his motions to dismiss made at the close of the State's evidence and renewed at the close of all of the evidence. As detailed in the background above, the trial court determined there was insufficient evidence of premeditated first degree murder, but determined there was sufficient evidence for the State to proceed on first degree felony murder and the kidnapping and obtaining property by false pretense charges.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Defendant contends the evidence in this case falls short of substantial evidence and raises only a suspicion that defendant murdered, kidnapped, or raped Palacios; or that defendant was not in lawful possession of the ring that he sold to the pawn shop. More specifically, defendant asserts that although there was evidence of Palacios' disappearance, there was little evidence that she was dead or that defendant caused her death. Defendant further asserts the State failed to produce evidence that Palacios was restrained in the house or desired to leave; that defendant and Palacios engaged in nonconsensual sexual activities; or that Palacios did not give defendant the ring in exchange for drugs.

The State concedes that, because this is a no body case, its case is based primarily on circumstantial evidence. Citing *State v. Sokolowski*, 351 N.C. 137, 147, 522 S.E.2d 65, 71 (1999) (comparing circumstantial evidence to strands in a rope in that "no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond reasonable doubt") (quoting *State v. Austin*, 129 N.C. 534, 535, 40 S.E. 4, 5 (1901)), the State argues that the combined circumstantial evidence presented in this case was sufficient to prove defendant's guilt.

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted) (emphasis in original).

Here, the State directs this Court's attention to the following circumstantial evidence: Palacios was last seen at defendant's residence in defendant's company on 31 July 2015; no one has heard from Palacios since 31 July 2015, not even her family; extensive efforts by law enforcement to find Palacios have been unsuccessful; Palacios sounded distressed during a phone call with Parker on 31 July 2015, in which Parker heard Palacios yell "he's hurting me," followed by defendant stating they were just playing before hanging up the phone; Palacios' cellular phone pinged a tower near defendant's residence during the call between Palacios and Parker and last pinged a tower near defendant's residence before it "went dark"; Palacios' vehicle was left in defendant's driveway after she disappeared; defendant maintained control over who entered and left his house, and when they entered and left his house, by locking deadbolts and maintaining control of the keys; defendant traded drugs for sex with girls and would become violent when the girls refused sex after he provided drugs; defendant possessed a ring belonging to Palacios, which had blood on it, and pawned it for cash the day after she disappeared; there was a bad odor in defendant's residence the day after Palacios went missing; defendant did not want Dunn to

touch his bedroom carpet or use the hallway bathroom the day after Palacios disappeared; defendant removed his bedroom carpet within days of Palacios' disappearance and it was never found; defendant removed blood stained carpet padding from his bedroom; evidence of blood, including drips, spray, and smears, was found in defendant's residence; lab tests on blood evidence discovered in defendant's house indicated that it contained Palacios' DNA; the amount of blood discovered in defendant's residence was consistent with cases in which the victims needed immediate medical attention; defendant cleaned his house after Palacios' disappearance and cleaning products were discovered; a baseball bat seen in defendant's residence as recently as the morning of Palacios' disappearance was never found; Palacios' car keys were found in defendant's house; defendant's explanations shifted once more evidence was discovered; and defendant appeared nervous to a detective.

Defendant attempts to explain this evidence, and highlights evidence that is favorable to his defense. However, when the evidence is viewed in the light most favorable to the State, as it must be, we agree with the State that the circumstantial evidence is sufficient to support a reasonable inference of defendant's guilt on each charge to survive defendant's motion to dismiss the charges. Thus, the trial court did not err in allowing the jury to decide the case.

III. Conclusion

For the reasons discussed, we find no error and hold the defendant received a fair trial.

NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

I concur fully with Majority's analysis in Parts II-2 and II-3. However, I concur in Part II-1 solely because our review of the trial court's decision is strictly for an abuse of discretion. *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

STATE v. THOMPSON

[265 N.C. App. 576 (2019)]

STATE OF NORTH CAROLINA
v.
KOLTON JAMES THOMPSON, DEFENDANT

No. COA18-885

Filed 21 May 2019

1. Evidence—character—assault—implication in prior narcotics activity—Rule 404(b)

In a prosecution for assault with a deadly weapon, an officer's testimony that he had previously encountered defendant in connection with a narcotics case—to explain how he could identify defendant—constituted error to the extent the reference to narcotics did not add to the reliability of the officer's identification of defendant. However, any error did not rise to the level of plain error where defendant was caught on a surveillance video as the perpetrator of the shooting.

2. Appeal and Error—error already corrected—objection to negative character evidence sustained

Defendant's argument that an officer's testimony—suggesting defendant may have been involved in gang activity—was improperly admitted was resolved when the trial court sustained his objection at trial.

3. Evidence—character—assault—witness intimidation—Rule 404(b)

In a prosecution for assault with a deadly weapon, no plain error occurred from a detective's testimony suggesting defendant intimidated the victim because the testimony was relevant as an explanation for why the victim did not identify his shooter or participate in the trial.

4. Constitutional Law—right to remain silent—prosecutor's questions—eliciting improper testimony

Although a prosecutor elicited impermissible testimony from a detective regarding defendant's decision not to speak further during an investigative interrogation, the admission of the testimony did not amount to plain error given the substantial evidence of defendant's guilt where defendant was identified on a surveillance video as the perpetrator of a shooting.

5. Appeal and Error—preservation of issues—waiver—constitutional right to remain silent—closing argument—prosecutor's statements

Defendant's argument on constitutional grounds that a prosecutor's statements at closing improperly referenced defendant's right to remain silent was waived for failure to object, and he failed to preserve for appellate review that the statements violated N.C.G.S. § 15A-1230 by not raising that ground on appeal.

Appeal by defendant from judgments entered 5 April 2018 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.

James F. Hedgpeth, Jr., for defendant-appellant.

ARROWOOD, Judge.

Kolton James Thompson ("defendant") appeals from judgments entered on his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon. For the reasons stated herein, we find no error in part, and dismiss in part.

I. Background

A New Hanover County Grand Jury indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon on 31 July 2017. The matter came on for trial on 4 April 2018 in New Hanover County Superior Court, the Honorable Richard Kent Harrell presiding. The State's evidence tended to show as follows.

On 7 May 2017, the Wilmington Police Department responded to a report that a shooting had taken place at a nightclub called the Sportsman's Club. One of the responding officers, Officer Wade Rummings, testified that "[a] lot of people" were "hanging around the parking lot, walking out of the club[,]" but "[e]veryone said they didn't see or hear anything." However, when he canvassed the scene, Officer Rummings "located a spent shell casing on the sidewalk leading north to the back parking lot." He also found a shell about five to ten feet from the shell casing. Eventually, the officers were able to determine the

victim, Angeleos Williams, had been transported to the hospital to be treated for "a gunshot wound to his leg or thigh."

The officers obtained a copy of the nightclub's security video that recorded the shooting. The video depicts "[a] subject[ ] walking . . . down the northwest side of the building towards the front of the . . . business. And then, again, shortly thereafter with the victim, walking alongside of the victim, and then the shooting occurred." Based on the video, Detective Lonnie Waddell ("Detective Waddell") identified the shooter as defendant. Detective Jeremy David Barsaleau ("Detective Barsaleau") and one other detective used this information to create a photo lineup that included defendant. The lineup was shown to the victim, who did not confirm the shooter's identity. However, Detective Barsaleau testified the victim's demeanor "appeared [as though] he wanted not to really identify the suspect, that -- that he knew who he was, but has had personal dealings with a brother of his in the past that had been killed because he had snitched and didn't want to become part of that as well."

Based upon the videotape evidence, defendant was arrested on 9 June 2017. After his arrest, he underwent a custodial interrogation with Detective Barsaleau, a recording of which was entered into evidence at trial. During the interview, defendant acknowledged being present at the club the night of the shooting, but denied shooting the victim. When Detective Barsaleau showed defendant still photos of the surveillance video, he "dropped his head and basically said he was done."

The jury found defendant guilty of both charges. The trial court imposed an active sentence of 110 to 114 months for the offense of assault with a deadly weapon with intent to kill inflicting serious injury, and 19 to 32 months for the offense of possession of a firearm by a felon, to run consecutively.

Defendant appeals.

II. Discussion

On appeal, defendant contends the trial court committed plain error by allowing the State: (1) to present inadmissible character evidence; and (2) to elicit improper testimony and make improper comments during closing argument related to defendant's exercise of his right to remain silent.

A. Character Evidence

Defendant argues the trial court plainly erred by allowing the State to present character evidence of criminal conduct that was inadmissible

under Rule 404(b) of the North Carolina Rules of Evidence, including evidence defendant had a history of gang membership, narcotics activity, and witness intimidation. We review for plain error because defendant did not object on this basis at trial.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4) (2019).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). For our Court to find "that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citations and internal quotation marks omitted); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (explaining plain error arises when an error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" (citation and quotation marks omitted)).

Rule 404(b) of the North Carolina Rules of Evidence provides, in relevant part,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). Significantly, "the Rule 404(b) list of other purposes is nonexclusive," as "Rule 404(b) is a rule of inclusion of relevant evidence with but one exception, that is, the evidence must be excluded if its only probative value is to show that [the] defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Weldon*, __ N.C. App. __, __, 811 S.E.2d 683, 689-90 (2018) (citations and internal quotation marks omitted) (emphasis in original).

i. Narcotics

[1] Defendant first argues the trial court erred when it failed to exclude Detective Waddell's testimony that he knew defendant and "had . . . direct observations of [ ] defendant as an interest in part of [his] job" "around the end of 2013, 2014 time period" when he "was working vice/narcotics, and it was a narcotic-related case" pursuant to Rule 404(b).

Defendant supports his argument with *State v. Weldon*. In *Weldon*, an officer testified that he had seen the defendant when he "was dealing with a complaint about [a] house on Blatent Court. It was a drug complaint that I got from the citizens. While investigating that I saw the defendant come out of the house and get into the vehicle." *Weldon*, __ N.C. App. at __, 811 S.E.2d at 689 (alteration in original). Although the Court determined the "challenged portions of [the officer's] testimony were relevant in that they established [his] familiarity with defendant's appearance[,]" it also determined that the inclusion of the detail that the officer was investigating "a drug complaint" did not add to the reliability of the officer's identification of defendant, and was thus inadmissible under Rule 404(b). *Id.* at __, 811 S.E.2d at 690. Nonetheless, *Weldon* determined this error did not constitute plain error because:

> [n]otwithstanding the character implications of the admission of testimony that defendant was seen exiting a house that was being investigated in response to "a drug complaint," the State presented the testimony of three witnesses familiar with defendant who identified him as the individual shooting a weapon in the surveillance video. This testimony was strong enough to have supported the jury's verdict on its own.

Id.

Similarly, here, the challenged testimony was relevant to establish Detective Waddell's familiarity with defendant's appearance, providing the basis for his identification of defendant as the shooter in the surveillance video. However, the testimony also contains the detail that Detective Waddell encountered defendant related to a narcotics case, which has negative character implications, but does not add to the reliability of the detective's identification of defendant. Therefore, although the testimony admitted tending to show Detective Waddell was familiar with defendant's appearance was admissible under Rule 404(b) as relevant for a purpose other than to establish defendant's character, the detail that Detective Waddell encountered defendant related to a narcotics case constituted error.

Even so, this error does not constitute plain error. The State presented surveillance video of an individual shooting the victim, and a witness familiar with defendant, Detective Waddell, identified him as the individual in the video. As in *Weldon*, this evidence is sufficient to support the jury's verdict on its own. Thus, defendant cannot establish plain error because he cannot show the error at issue had a probable impact on the jury's finding that the defendant was guilty.

ii. Gang Membership

[2] Next, defendant argues the trial court plainly erred by admitting improper character evidence of criminal conduct under Rule 404(b) of defendant's purported gang membership. This argument challenges the following excerpt of Detective Waddell's testimony:

> [DETECTIVE WADDELL]: Immediately after I saw [the surveillance video], I -- I said, "That's Kolton Thompson."
>
> [THE STATE]: So it was immediate?
>
> [DETECTIVE WADDELL]: Yes, sir.
>
> [THE STATE]: And -- and why was it so immediate for you?
>
> [DETECTIVE WADDELL]: Because the multiple times I've dealt with [defendant], of me knowing him, and it is my job to know him by who's related to any type of gang activity in the city.
>
> [DEFENDANT]: Objection.
>
> THE COURT: Sustained.

As evidenced by the transcript, defendant objected to the statement regarding gang activity at trial, and the trial court sustained the objection. Therefore, the trial court corrected any error, and we need not address this allegation of error on appeal.

iii. Witness Intimidation

[3] Defendant also challenges the following testimony of Detective Barsaleau, which defendant argues constitutes inadmissible character evidence based on his intimidation of the victim.

> [THE STATE]: What did you do after speaking with Detective Waddell and looking at that [surveillance] video?
>
> [DETECTIVE BARSALEAU]: I put a photo lineup together and went out to the hospital with another detective, who

> wasn't familiar with the case, showed the victim -- the other victim -- or, excuse me -- the other detective showed the victim the photo lineup out at the hospital.
>
> [THE STATE]: And after doing that, did you have any success in further identifying --
>
> [DETECTIVE BARSALEAU]: No --
>
> [THE STATE]: -- who the shooter was?
>
> [DETECTIVE BARSALEAU]: -- I was not.
>
> [THE STATE]: Do -- how would you describe Mr. Williams' demeanor as you were interacting with him?
>
> [DETECTIVE BARSALEAU]: He appeared he wanted not to really identify the suspect, that -- that he knew who he was, but has had personal dealings with a brother of his in the past that had been killed because he had snitched and didn't want to become part of that as well.
>
> [THE STATE]: On May 23rd, did you again meet with the victim and kind of run into the same behavior that you had done -- done before?
>
> [DETECTIVE BARSALEAU]: Yes, sir.

Assuming *arguendo* this testimony suggested defendant intimidated the victim, the testimony was not admitted in violation of Rule 404(b) because it was relevant as an explanation for why the victim did not identify the shooter, and for why the victim did not testify at trial. Therefore, it was admissible for a purpose other than its negative character implications. As a result, we hold the trial court did not plainly err by admitting this testimony into evidence.

B. Right to Remain Silent

Defendant argues the trial court plainly erred by allowing the prosecutor: (1) to elicit improper testimony, and (2) to make improper comments during closing argument related to defendant's exercise of his right to remain silent.

i. Detective Barsaleau's Testimony

[4] We first address defendant's allegation that the trial court plainly erred by allowing the prosecutor to elicit improper testimony from Detective Barsaleau concerning defendant's constitutional right to remain silent.

Defendant did not object to the admission of this testimony; therefore, he did not preserve a constitutional question which would have entitled him to have the error examined under the constitutional harmless beyond a reasonable doubt framework. However, a defendant who argues that testimony to which he did not object violated his constitutional rights is entitled to have the admission of this testimony reviewed for plain error. *State v. Moore*, 366 N.C. 100, 105-106, 726 S.E.2d 168, 173 (2012) (citing N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.")) (citations omitted).

To establish the trial court plainly erred, defendant must "demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice–that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). "In order to ensure plain error is reserved for the exceptional case, . . . plain error requires a defendant to show that the prejudicial error was one that seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 321 (2015) (citation and internal quotation marks omitted).

We afford the right to silence, enshrined in the Fifth Amendment of the Constitution of the United States, a "liberal construction in favor of the right it was intended to secure." *Moore*, 366 N.C. at 105, 726 S.E.2d at 172-73 (citations and internal quotation marks omitted). Thus, "[e]xcept in certain limited circumstances, any comment upon the exercise of [the right to remain silent], nothing else appearing, [is] impermissible. An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it." *Id.* at 105, 726 S.E.2d at 172 (citations and internal quotation marks omitted) (alterations in original).

Detective Barsaleau testified as follows concerning his interview with defendant:

> [THE STATE]: Can you describe after you read him his rights what you said and how he answered?
>
> [DETECTIVE BARSALEAU]: More or less he said that, yes, he was at the Sportsman's Club that night for a birthday party of a friend, but denied to the shooting. I told him that we had the whole thing on video from the Sportsman's

> Club. He asked to see the video. I told him I -- I couldn't show him the video, but to hang tight where I came back with some still shots from the video. I showed him the still shot from the video, and he just dropped his head and basically said he was done.
>
> . . . .
>
> [THE STATE]: So these were the [still photos] where you said after you showed them to the defendant, he ultimately put his head down and said that he was done talking?
>
> [DETECTIVE BARSALEAU]: Yes, sir.
>
> [THE STATE]: Your Honor, permission to publish defendant's interview to the jury.
>
> . . . .
>
> THE COURT: You can publish that to the jury.

The interview of the defendant that was published to the jury showed that, after Detective Barsaleau read defendant his *Miranda* rights and showed him the photographs, defendant twice stated, "I don't want to talk" while being interrogated.

Assuming *arguendo* the prosecutor elicited improper evidence concerning defendant's invocation of his right to silence, the testimony did not constitute plain error. To assess plain error in this context, our Court considers the following factors, none of which are determinative:

> (1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

State v. Richardson, 226 N.C. App. 292, 302, 741 S.E.2d 434, 442 (2013) (footnote omitted).

Here, the prosecutor directly elicited the testimony. Further, the prosecutor impermissibly used this evidence in closing argument to attack defendant's credibility based on his decision to invoke his constitutional right to silence. Defendant's credibility was not otherwise successfully attacked. These factors weigh in favor of a plain error determination; however, we must also consider the substantial evidence of defendant's guilt in the record. *See id.*

In the instant case, the evidence tends to show defendant acknowledged being at the club the night of the shooting. Law enforcement obtained a copy of security video footage from the club that showed the shooting take place. As Detective Barsaleau testified, the video showed: "[a] subject[ ] walking . . . down the northwest side of the building towards the front of the . . . business. And then, again, shortly thereafter with the victim, walking alongside of the victim, and then the shooting occurred." Detective Waddell was able to immediately identify the subject in the video as defendant. Both the video and still shots from the video were admitted into evidence. The strength of this evidence weighs strongly against a plain error determination.

In weighing the *Richardson* factors it is the duty of this Court to weigh all the factors. No one of the four *Richardson* considerations is determinative. In addition, the fact that three factors support the defendant and only one factor supports the State is also not determinative. Where, as in the situation we have here, there is such strong uncontroverted evidence against defendant, the strength of the evidence may still support a determination of no plain error even though all the other factors weigh in defendant's favor. After an examination of the entire record, we hold that, given the video surveillance evidence described herein, the error alleged did not constitute plain error.

ii. Closing Argument

[5] We now turn to defendant's argument that the trial court plainly erred by allowing the prosecutor to make improper comments during closing argument related to defendant's exercise of his right to remain silent. Specifically, the prosecutor referenced defendant's decision to remain silent after seeing the stills of the surveillance video, and asked the jury,

> The defendant puts his head down after that, didn't he? He put his head down on the table because he knew he was done. He even said, "I'm done talking."
>
> At that point, the game was over for him. What does he do after that? Now, he has a perfect right not to say anything,

> not to be interviewed, not to testify, and every defendant enjoys that right in our court system.
>
> But if you were in an interview room and a detective was accusing you of committing this shooting and you didn't do it, how would you react? Would you put your head down and go to sleep?

However, we are unable to review this issue on appeal.

Our Supreme Court has held that constitutional arguments regarding closing arguments which are not objected to at trial are waived. *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011). Although the Supreme Court declined to review the constitutional argument in *Phillips* because of defendant's failure to object, the Court did review for violations of N.C. Gen. Stat. § 15A-1230 (2017) in this context. *Id.* Here, unlike the defendant in *Phillips*, defendant did not make an argument under N.C. Gen. Stat. § 15A-1230 on appeal. Accordingly, we cannot review on this basis. Thus, defendant failed to preserve this argument for appellate review. We decline to review this argument for the first time on appeal.

III. Conclusion

For the forgoing reasons, we find no error in part, and dismiss defendant's argument that the trial court plainly erred by allowing the prosecutor to make improper comments on his exercise of his right to remain silent during closing argument.

NO ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and DILLON concur.

TAYLOR v. PERNI

[265 N.C. App. 587 (2019)]

CORTNEY TAYLOR AND CALISTA KAJ BURTON TAYLOR, PLAINTIFFS
v.
MARK PERNI, D.O.; JENNIFER ANGELILLI; BESTPRACTICES OF WEST VIRGINIA, INC.; AND BESTPRACTICES, INC., DEFENDANTS.

No. COA18-602

Filed 21 May 2019

Civil Procedure—motion to quash subpoena—Rule 45—reliance on affidavit—independent review of basis

In a medical malpractice action, the trial court abused its discretion in granting a motion to quash a subpoena pursuant to Civil Procedure Rule 45(c)(3)(b) solely on the basis that an employment separation agreement prohibited the disclosure of the information sought—without examining the agreement itself, and instead relying on the motion's accompanying affidavit, which contained mere allegations.

Appeal by Plaintiffs from Order entered 17 February 2018 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 30 January 2019.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr., and Bordas & Bordas, PLLC, by J. Zachary Zatezalo, for plaintiffs-appellants.

Poyner Spruill LLP, by J. Nicholas Ellis and Dylan J. Castellino, for nonparty-appellee Daniel G. Kirkpatrick.

MURPHY, Judge.

The trial court abused its discretion by granting a motion to quash a subpoena under Rule 45(c)(3)(b) of the North Carolina Rules of Civil Procedure when it failed to review an outside contract that allegedly protected the information sought under the subpoena and granted the motion solely on the basis of the moving party's assertion that the contract protected the information. We reverse and remand for further proceedings.

BACKGROUND

Plaintiffs, Cortney Taylor and Calista Burton Taylor ("the Taylors"), brought several claims in a medical malpractice action in West

Virginia against numerous Defendants, including BestPractices, Inc. ("BestPractices"). BestPractices provided "emergency and hospitalist staffing and management solutions to hospitals and healthcare institutions." When the events underlying the Taylors' medical malpractice action occurred, Daniel G. Kirkpatrick ("Kirkpatrick") was then employed in a corporate position by BestPractices, and subsequently EmCare, Inc. ("EmCare") following its acquisition of BestPractices. In his role as Vice-President of Operations, Kirkpatrick "worked with the financial team with emphasis on business and financial aspects of the company's operations."

Kirkpatrick was not a party to the civil action against Best Practices and other Defendants; however, on 21 September 2017, the Nash County Superior Court[1] issued a subpoena ordering Kirkpatrick to appear and testify at a deposition and produce various documents related to his employment with Best Practices and, later, EmCare. Kirkpatrick's deposition was scheduled to take place on 16 October 2017. That morning, Kirkpatrick filed a *Motion to Quash Subpoena* in Nash County Superior Court. Kirkpatrick claimed that, when he ended his employment with EmCare in 2013, he signed a separation agreement that "precluded him from disclosing non-public information acquired by virtue of his employment." As such, Kirkpatrick argued the subpoena should be quashed under Rule 45(c)(3)(b) of the North Carolina Rules of Civil Procedure, as it required disclosure of privileged or other protected matter and that no exception or waiver applied to the privilege or protection.

The sole document attached in support of Kirkpatrick's motion to quash was his own affidavit, attempting to serve as parol evidence of the alleged agreement. It stated, in relevant part:

> 15. At the time of execution, it was my understanding and expectation that the Separation Agreement precluded me from disclosing any and all information that I acquired by virtue of my employment with BestPractices or EmCare which was not otherwise available to third parties.
>
> 16. At the time of execution of my Separation Agreement, it was my understanding and expectation that the contents of the document itself were confidential.

1. While the underlying civil action was filed and ongoing in West Virginia, Kirkpatrick was a resident of Nash County.

> 17. At the time of execution, it was my understanding and expectation that the obligation to maintain confidentiality of proprietary information and the contents of the Separation Agreement survived the general term of the Separation Agreement and the termination of my employment with EmCare.

The trial court held a hearing on the motion to quash on 2 January 2018. Kirkpatrick's counsel informed the trial court that he had a copy of the separation agreement should the trial court wish to review the agreement and its non-disclosure terms *in camera*. However, the trial court did not review the separation agreement and later issued its order on 23 February 2018 granting the motion to quash pursuant to Rule 45(c)(3) and (5). The Taylors timely appeal.

ANALYSIS

The Taylors argue the trial court abused its discretion in granting the motion to quash. Specifically, they argue the trial court abused its discretion by determining Kirkpatrick's separation agreement with EmCare rendered the information sought under the subpoena non-discoverable solely on the basis of Kirkpatrick's affidavit. We agree.

"When reviewing a trial court's ruling on a discovery issue, [we] review[] the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010). Abuse of discretion occurs upon a showing that the trial court's ruling "was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017) (citation and internal quotation marks omitted).

Rule 45 of the North Carolina Rules of Civil Procedure requires the trial court to "quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection." N.C.G.S. § 1A-1, Rule 45(c)(5) (2017). Rule 45(c)(3) states in relevant part:

> (3) Written objection to subpoenas. – . . . Each of the following grounds may be sufficient for objecting to a subpoena:

> (b) The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.

N.C.G.S. § 1A-1, Rule 45(c)(3)(b) (2017).[2]

We have not directly addressed what a party objecting to a subpoena under Rule 45(c)(3)(b) must show or what the trial court must review in a situation where the movant is claiming that the subpoena requires disclosure of matters protected by an outside contract, if ever possible. In the discovery setting, generally, "[t]he decision to conduct *in camera* review rests in the sound discretion of the trial court." *Lowd v. Reynolds*, 205 N.C. App. 208, 213, 695 S.E.2d 479, 483 (2010) (citation and internal quotation marks omitted). Thus, the trial court is not required to conduct an *in camera* review in all circumstances involving allegedly privileged documents. However, our caselaw makes clear that mere assertions of the existence of a privilege or protection, without more, do not establish such.

In *Miles v. Martin*, 147 N.C. App. 255, 555 S.E.2d 361 (2001), we addressed the burden of a party seeking to assert the recognized attorney-client privilege in response to a motion to compel documents. We noted that "[m]ere assertions by a party or its attorneys" of the existence of the attorney-client privilege is insufficient to establish the attorney-client privilege. *Id.* at 260, 555 S.E.2d at 364 (citation, alterations, and internal quotation marks omitted). We held, "the party asserting the privilege can only meet its burden by providing some *objective* indicia that the exception is applicable under the circumstances." *Id.* at 259-60, 555 S.E.2d at 364 (citation and internal quotation marks omitted) (emphasis in original). We believe the same showing of objective indicia is required when a movant objects to a subpoena under Rule 45(c)(3)(b) by asserting that the subpoena requires disclosure of matters alleged to be privileged or protected by an outside contract and that no exception or waiver applies to the privilege or protection. To hold otherwise would allow a party to invoke Rule 45(c)(3)(b) with a "mere utterance" of privilege or protection. *See Multimedia Pub'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 576, 525 S.E.2d 786, 792 (2000).

Here, the trial court did not conduct an *in camera* review of the separation agreement between Kirkpatrick and EmCare, and the contents of the agreement were never disclosed to the trial court. The trial court

---

2. Rule 45(c)(3)(b) is the only ground under subsection (3) under which Kirkpatrick objected to the subpoena.

thus based its decision to grant the motion to quash solely on the affidavit Kirkpatrick submitted in support of his motion. Of course, affidavits may be used in demonstrating the existence of a privilege or protection. *See Estate of Ray v. Forgy*, 245 N.C. App. 430, 441-42, 783 S.E.2d 1, 9 (2016). Kirkpatrick's affidavit, however, did not demonstrate objective indicia that the separation agreement protected the information to be disclosed under the subpoena.

Kirkpatrick provided no testimony in his affidavit about the content of the separation agreement, claiming, "It was my understanding and expectation that the contents of the separation agreement itself would be confidential." There was no showing before the trial court regarding the content of the separation agreement, its specific terms, its scope, the intent of the agreement, or how such language would be privileged beyond the contracting parties' desire for it be so. Instead, the only showing Kirkpatrick made as to the separation agreement's applicability to the information sought under the subpoena was his "*understanding and expectation*" that the separation agreement would preclude employees from disclosing any and all information acquired by virtue of their employment.

A party's personal interpretation of what a contract precludes without any showing as to the actual contents of the contract is not objective indicia, nor is it a sound legal basis for a privilege. It is the functional equivalent of a mere allegation. *See Hammond v. Saini*, 367 N.C. 607, 611, 766 S.E.2d 590, 592 (2014) ("Instead, the affidavit merely recites the language of the statute and offers the conclusory assurance that each requirement has been satisfied."). To allow a party's motion to quash under Rule 45(c)(3)(b) based only upon his or her claim that the mere existence of a contract protects information to be disclosed, without more, would be to allow a party's incantation of protection as an "abracadabra to which [we] must defer judgment." *See Multimedia Pub'g of N.C., Inc.*, 136 N.C. App. at 576, 525 S.E.2d at 792 (quoting *MacLennan v. American Airlines, Inc.*, 440 F. Supp. 466, 472 (E.D. Va. 1977).

Kirkpatrick cites a line of cases where we have held the trial court did not abuse its discretion in failing to review documents sought to be discovered *in camera*, arguing a similar outcome is required here. *Midkiff v. Compton*, 204 N.C. App. 21, 693 S.E.2d 172, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010); *Lowd v. Reynolds*, 205 N.C. App. 208, 695 S.E.2d 479 (2010); *State v. Love*, 100 N.C. App. 226, 395 S.E.2d 429 (1990). The question before us in those cases, however, is not that which is before us here.

In *Midkiff*, for example, the plaintiff had waived the physician-patient privilege, a legally recognized privilege, and was challenging the trial court's failure to conduct an *in camera* review "to prevent disclosure of *irrelevant* or causally *unrelated* evidence." *Midkiff*, 204 N.C. App. at 35, 693 S.E.2d at 181 (emphasis added); *see also Lowd*, 205 N.C. App. at 213-14, 695 S.E.2d at 483-84 (citing the rationale in *Midkiff* for why the trial court did not abuse its discretion in refusing to review the documents for relevancy). In *Love*, we stated, "there is no requirement that a trial court review the *records and files* of non-parties sought pursuant to a subpoena *duces tecum* prior to quashing . . . ." *Love*, 100 N.C. App. at 231, 395 S.E.2d at 432 (emphasis added). The question before us in those cases was, therefore, whether the trial court abused its discretion in failing to: (1) review the documents sought under the subpoena (2) for their relevancy. Neither is the issue before us. Here, the trial court was not ruling on the relevancy of actual documents sought under the subpoena, but, rather, whether an outside contract rendered these documents protected. Defendant's citation to these holdings and his subsequent argument is misplaced.

Accordingly, the trial court abused its discretion in granting Kirkpatrick's motion to quash pursuant to Rule 45(c)(3)(b) solely on the basis of Kirkpatrick's affidavit containing no more than mere allegations that the separation agreement as an outside contract protected the information sought under the subpoena. We need not address the Taylors' remaining alternative arguments or whether such a private agreement can create such a privilege or protection.

CONCLUSION

Kirkpatrick's affidavit contained no more than mere allegations that the separation agreement protected the information sought under the subpoena and thus provided no objective indicia that this separation agreement protected the information. The trial court, without reviewing the contents of the separation agreement, abused its discretion in granting the motion to quash pursuant to Rule 45(c)(3)(b) solely on this basis. We reverse and remand to the trial court for further proceedings on the motion to quash not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges DILLON and ARROWOOD concur.

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST III, PLAINTIFF

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR ACOPIA, LLC, SOUTHAMPTON COMMONS HOMEOWNERS ASSOCIATION, INC., ROSSABI BLACK SLAUGHTER, PA, KEITH H. PROPERTY, LLC, KEITH LAMANCE HARRELL, IH6 PROPERTY NORTH CAROLINA, LP AND DOE DEFENDANTS A-Z, DEFENDANTS

No. COA18-1060

Filed 21 May 2019

Mortgages and Deeds of Trust—recordation—priority—purported satisfaction recorded by unauthorized third party—notice of pending litigation

Where an unauthorized third party recorded a purported satisfaction of a deed of trust, plaintiff (mortgagee and assignee) was entitled to step into the shoes of its assignor and predecessors-in-title to have its status as priority lienholder restored over an innocent purchaser for value—regardless of plaintiff's notice of the pending litigation concerning priority.

Appeal by plaintiff from orders entered 4 December 2017 and 16 January 2018 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 March 2019.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, Mark S. Wierman and G. Benjamin Milam, for plaintiff-appellant.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for defendant-appellee IH6 Property North Carolina, LP.

TYSON, Judge.

Wilmington Savings Fund Society ("Plaintiff") appeals from an order granting IH6 Property North Carolina, LLC's ("Defendant") motion for judgment on the pleadings pursuant to Rule 12(c) of the N.C. Rules of Civil Procedure and an order denying Plaintiff's motion for reconsideration. We reverse and remand.

I. Background

Keith Harrell purchased property located at 9007 Holland Park Lane in Charlotte, North Carolina, in February 2009. Harrell borrowed $171,830 from Acopia, LLC, as evidenced by a promissory note. To secure the note, Harrell executed a deed of trust in favor of Mortgage Electronic Registration Systems ("MERS"), solely as nominee for Acopia and its successors and assigns. Through a series of assignments, LSF9 Master Participation Trust ("LSF9") acquired the note and deed of trust in July 2015. Harrell subsequently defaulted on payments due under the terms of the note and deed of trust.

The Southampton Commons Homeowners Association, Inc. ("HOA") filed a lien against Harrell's property at 9007 Holland Park Lane for unpaid assessments. Following a hearing in August 2015, the property was sold at auction to Keith H. Property, LLC ("Keith Property"). The HOA conveyed the property via a quitclaim deed with title expressly "subject to any and all superior liens," which was recorded in the Mecklenburg County Public Registry on 18 December 2015.

Kondaur Capital Corporation ("Kondaur") acquired the note and deed of trust on 28 October 2015 through assignment from LSF9. This assignment was recorded on 3 December 2015. A purported satisfaction of the deed of trust was executed by a vice president of MERS, without any authority, and was recorded on 2 December 2015 in the Mecklenburg County Public Registry.

Keith Property conveyed its interest in the property to Defendant via general warranty deed, recorded on 7 March 2016. Kondaur initiated action against Defendant; MERS; the HOA; the substitute trustee that handled the HOA sale; Harrell; and Keith Property on 15 September 2016. Kondaur's complaint requested the trial court to issue a judgment declaring, *inter alia*, the deed of trust remained a valid, enforceable first priority lien on the property, and that Defendant had acquired its interest in the property subject to Kondaur's prior lien. A notice of *lis pendens* was filed 26 September 2016. Defendant served its affirmative defenses, answer, and counterclaim on 21 November 2016, seeking to quiet the title of the property pursuant to N.C. Gen. Stat. §§ 41-10 and 1-253.

Plaintiff acquired the note and deed of trust from Kondaur in a pool of loans it purchased on or about 25 November 2016. An assignment evidencing the transaction was executed on 8 December 2016 and recorded on 21 July 2017. Plaintiff filed a motion to substitute as a party and an answer to Defendant's counterclaim on 10 January 2017.

The trial court entered a consent final judgment concerning MERS on 3 April 2017. The court's consent judgment found and concluded MERS no longer held any interest in the deed of trust at the time the purported satisfaction was executed and recorded, it was without authority to execute the satisfaction, and the satisfaction was void.

Following discovery, Plaintiff filed a motion for summary judgment in August 2017. In September 2017, Defendant filed a motion for judgment on the pleadings. After a hearing, the trial court entered an order granting Defendant's motion for judgment on the pleadings on 4 December 2017. Plaintiff made a motion for reconsideration, which was denied without a hearing on 16 January 2018. Plaintiff timely appealed both orders.

II. Jurisdiction

The order granting judgment on the pleadings and the order denying reconsideration were interlocutory, as they only disposed of the claim between Plaintiff and Defendant. Subsequently, Plaintiff voluntarily dismissed all remaining claims against the other defendants, and Defendant voluntarily dismissed its counterclaim against Plaintiff. As all other parties and claims have been disposed of, the orders concerning Plaintiff and Defendant are now final, and are appealable as a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Plaintiff argues the trial court erred by granting Defendant's Rule 12(c) motion for judgment on the pleadings. It asserts the trial court disregarded the Rule 12(c) standard of review and improperly drew all inferences in favor of Defendant. Plaintiff also argues the trial court erred in balancing the equities in favor of Defendant.

IV. Standard of Review

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). All facts and inferences are to be viewed in the light most favorable to the non-movant. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.*

This Court reviews a grant of a motion for judgment on the pleadings *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

V. Analysis

The order included in the record is limited, merely concluding, after review of the pleadings, that Defendant was entitled to judgment as a matter of law and all Plaintiff's claims against Defendant are dismissed without prejudice. Prior to ruling on Plaintiff's motion for reconsideration, the trial court sent an e-mail, which concluded with the following paragraph:

> [P]lease prepare a summary order without any findings of fact or anything along the lines of what I've described above and send the same with a SASE to my office in the Mecklenburg County Courthouse within ten (10) days. This is a legal determination subject to *de novo* review, of course, and nothing is required other than a summary order. I do wish, however, for you to attach a copy of this email to the order so that it will make it into the record. As opposed to sending you a one-line email with a decision, I wanted to let counsel and the parties know the reasons I have decided to grant the Rule 12(c) motion.

When asked at oral arguments how this Court should view the e-mail included in the record, Defendant argued the e-mail should be disregarded, and this Court should only review the orders. Defendant asserted the trial court had later recanted and sent a subsequent e-mail directing the previous e-mail not to be included in the record. If such an e-mail was sent, and either party felt the record would be insufficient without it being included, the record should have supplemented. N.C. R. App. P. 9(b)(5). Further, Defendant cites to this earlier e-mail contained in the record in its brief.

This Court's scope of review is limited by what is included in the record, the transcripts, and any other items filed pursuant to Rule 9, all of which can be used to support the parties' briefs and oral arguments. N.C. R. App. P. 9(a). As part of the record on appeal, the trial court's e-mail is included in our *de novo* review. *See id.*

A. Plaintiff as Assignee

The trial court's e-mail purports to distinguish between an "assignment" and an "acquisition." The trial court reasoned Plaintiff was not a successor-in-interest of Kondaur because it "acquired" the note and deed of trust, and is thus unable to stand in the shoes of Kondaur and its

predecessors-in-interest to maintain the original priority of its interest. The trial court appears convinced by Defendant's argument, asserting only the original victim, in this case Kondaur, is eligible to seek the equitable remedy to maintain its priority under *Union Cent. Life Ins. Co. v. Cates*, 193 N.C. 456, 137 S.E. 324 (1927), and its progeny. We disagree.

In the priority of deed recordation, North Carolina is classified as a "pure race" state. N.C. Gen. Stat. § 47-18(a) (2017); *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E. 2d 769, 770 (1965). As a pure race state, the first person to record the conveyance of an interest in property takes priority, whether or not there is notice of other conveyances. *Schuman v. Roger Baker & Assocs., Inc.*, 70 N.C. App. 313, 316, 319 S.E.2d 308, 310 (1984) (citing *Bourne* 264 N.C. at 35, 140 S.E. 2d at 771) ("Our Supreme Court has repeatedly held that no notice, however full or formal, will supply the want of registration of a deed."). "The General Assembly, by enacting these laws, clearly intended that prospective purchasers should be able to safely rely on the public records." *Schuman*, 70 N.C. App. at 316-17, 319 S.E.2d at 311.

Under pure race priority recordation, Defendant, if found to be an innocent purchaser for value, would be able to rely upon an examination of the Mecklenburg County Public Registry, which included a satisfaction of the note, recorded on 2 December 2015. An equitable exception exists to this general rule:

> As between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title, or accepting a mortgage thereon as security for a loan, the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior.

Union Cent. Life Ins. Co., 193 N.C. at 462, 137 S.E. at 327.

Defendant argues this equitable exception can only apply to parties who are true, innocent victims. The trial court appears to have concluded, as a matter of law on the pleadings, that Plaintiff, by acquiring the note with notice of the pending litigation asserting priority, cannot claim to be an innocent victim of the void satisfaction. Defendant argues this notice deprives Plaintiff of the exception in *Union Central*:

> If, however, the owner of the mortgage is responsible for the mortgage being released of record, as when the entry of satisfaction is made possible by his own neglect, or misplaced confidence, or his own mistake, or where he is shown to have received actual satisfaction, or to have accepted the benefit of the transaction which resulted in the release, he will not be permitted to establish his lien to the detriment of one who has innocently dealt with the property in the belief that the mortgage was satisfied.

Id.

No evidence supports a finding that Plaintiff or Kondaur was responsible for the release of the mortgage; was neglectful; misplaced confidence; received actual satisfaction; or benefitted from the transaction, which resulted in the purported release. In fact, the consent judgment on MERS' purported action shows otherwise. Additionally, Defendant has failed to show that North Carolina common law and statutes do not allow Plaintiff to step into the shoes of Kondaur and its predecessors-in-interest and avail itself of the pure race exception set out in *Union Central. Id.* ("a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible. . . the lien of the prior mortgage, being first in order of time, is superior").

North Carolina law concerning the assignments of contracts is well established.

> The general rule is that contracts may be assigned. The principle is firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that a contract for money to become due in the future may be assigned.

Hurst v. West, 49 N.C. App. 598, 604, 272 S.E.2d 378, 382 (1980) (citation and quotation marks omitted).

"Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course." N.C. Gen. Stat. § 25-3-203(b) (2017). Our Supreme Court long ago established "the assignee stands absolutely in the place of his assignor[.]" *Smith v. Brittain*, 38 N.C. 347, 354 (1844).

Further, "if an innocent purchaser conveys to one who has notice, the latter is protected by the former's want of notice and takes free of the equities." *Morehead v. Harris*, 262 N.C. 330, 342, 137 S.E.2d 174, 185 (1964).

The fact Plaintiff purchased the note and deed of trust from Kondaur while litigation concerning priority was pending does not foreclose Plaintiff's ability to avail itself of the protections of *Union Central*. Kondaur's assignment of the deed of trust to Plaintiff allowed Plaintiff to step into the shoes of Kondaur and its predecessors-in-interest. Defendant's argument that subsequent purchasers of negotiable instruments cannot assert all the rights and defenses of the original holder, in the absence of fraud or other nefarious conduct, prejudices holders of negotiable instruments, and would chill or prevent the free and unfettered transferability of interests in property. Restraints or limitations on the free alienability, assignability, and transferability of property interests are disfavored in law. Defendant's argument is overruled.

B. Applicability of Union Central

Plaintiff argues the trial court improperly balanced the equities in favor of Defendant. We agree. Plaintiff stepped into the shoes of Kondaur and its predecessors-in-title and can avail itself of the exception to the pure race notice addressed in *Union Central* and its nearly 100 years of progeny.

The rule in *Union Central* was applied in *First Financial Savings Bank v. Sledge*: "The discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value." *First Fin. Sav. Bank v. Sledge*, 106 N.C. App. 87, 88, 415 S.E.2d 206, 207 (1992) (citing *Union Central*, 193 N.C. at 462, 137 S.E. at 327).

Plaintiff argues Defendant cannot claim it is an innocent purchaser for value. Whether Defendant was an innocent purchaser for value or not, Plaintiff, the mortgagee, is entitled to have its priority status restored, if the mortgage was discharged by an unauthorized act of a third party.

The trial court entered a consent final judgment concerning MERS' purported satisfaction of the note and cancellation of the deed of trust on 3 April 2017. The consent judgment found and concluded MERS no longer held any interest in the deed of trust at the time the purported satisfaction was executed and cancellation recorded, had no authority to execute the satisfaction and record the cancellation, and its action

was void. That consent judgment is not challenged, and is now the law of the case.

VI. Conclusion

An assignee is able to step into the shoes of the assignor and its predecessors- in-title. The equitable exception to pure race notice in *Union Central* is available to restore priority to purchasers of negotiable instruments, whether or not they have notice of pending litigation. The trial court erred in concluding Plaintiff had no standing to enforce priority.

The purported satisfaction of the note and cancellation of the deed of trust is acknowledged and agreed in the consent judgment to be an unauthorized act of a third party. A balancing of the equities under *Union Central* restores Plaintiff's priority status over Defendant.

The trial court's order concluding Defendant was entitled to judgment on the pleadings as a matter of law is reversed. In light of our ruling and the 3 April 2017 consent order, we remand this matter for the trial court to enter summary judgment for Plaintiff on Plaintiff's pending summary judgment motion. *It is so ordered.*

REVERSED AND REMANDED.

Judges DIETZ and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MAY 2019)

EVANS v. CROFT No. 18-468	Onslow (16CVS4032)	Reversed and Remanded
FLORES v. FLORES No. 18-230	Lenoir (15CVD521)	Affirmed
IN RE A.R.-V. No. 18-584	Buncombe (17JB211)	Affirmed
IN RE A.S.T. No. 18-947	Alamance (17JT72)	Affirmed
IN RE N.B. No. 18-1087	Onslow (17JA193) (17JA194) (17JA195)	Affirmed in Part; Reversed in Part and Remanded.
IN RE W.A.B. No. 18-953	Gaston (13JT84-89)	Affirmed
LAYTON v. DEP'T OF STATE TREASURER No. 18-921	Davidson (13CVS1739)	Affirmed
MEDPORT, INC. v. SMITH No. 18-950	Mecklenburg (17CVS2595)	Affirmed
MURCHISON v. REG'L SURGICAL SPECIALISTS No. 18-297	Buncombe (15CVS106)	Affirmed
NELSON v. NELSON No. 18-937	Guilford (09CVD414)	Affirmed
O'NAN v. NATIONWIDE INS. CO. No. 18-990	McDowell (16CVS943)	Dismissed
PIGFORD v. PACE No. 18-1095	Onslow (16CVD4004)	Affirmed
STATE v. BLACKWELL No. 18-1040	Lincoln (14CRS52871) (16CRS93)	Dismiss in part, No plain error in part.
STATE v. DURHAM No. 18-630	Guilford (17CRS65728)	No Error

STATE v. HARDEN No. 18-999	Union (16CRS53981)	No Error
STATE v. HAWKINS No. 18-908	McDowell (15CRS284) (15CRS50145)	No Error
STATE v. JONES No. 18-893	Beaufort (16CRS50753)	Affirmed
STATE v. MARKS No. 18-933	Forsyth (15CRS61535)	No Error
STATE v. McGILL No. 18-911	New Hanover (16CRS51275) (17CRS5473)	Affirmed; No Error
STATE v. MEDLIN No. 18-20	Wake (13CRS201942-43) (13CRS201951-52) (13CRS202897)	No error in part; No plain error in part.
STATE v. MUTHE No. 18-1265	Haywood (17CRS430-431)	No Error
STATE v. ROSS No. 18-652	Forsyth (16CRS4719) (16CRS60525)	No Error
STATE v. SYDNOR No. 18-589	Chowan (14CRS50123)	No Error
STATE v. TREVINO No. 18-741	Onslow (16CRS50758)	No Prejudicial Error
WALSTON v. DUKE UNIV. No. 18-981	N.C. Industrial Commission (14-052758) (14-782354)	Affirmed
WOODY v. FLIGHTGEST, INC. No. 18-940	Wake (17CVS4557)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS